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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD SCHRIVER, INC., SULLIVAN-KELLEY & ASSOCIATES, TOPAZ CONTRACTING & DEVELOPMENT COMPANY, INC., AND SULLIVAN AND ASSOCIATES,

Petitioners,

vs

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals misinterpreted Connell v. Plumbers Local 100, 421 U.S. 616 (1975), in broadening the Section 8(e) construction industry proviso to protect secondary subcontracting restrictions coercively imposed upon contractors by craft unions which have neither attempted to organize nor have been designated as a bargaining agent of the contractors' employees?

2. Whether secondary construction industry subcontracting agreements, unlawful under the "top down" organizing restrictions in Connell v. Plumbers' supra, become lawful solely because they are sought as part of an agreement covering wages, hours and working conditions?

3. Whether the Court of Appeals erred in supporting its broad construction of the proviso by relying upon a purported pre-1959 pattern of bargaining contradicted by the stipulated record in this case and not relied upon by the Board?

4. Whether the Court of Appeals erred in deferring to the decision of the NLRB in which the Board based its decision upon its interpretation in Connell v. Plumbers, supra, rather than the area of its expertise?

5. Whether the Section 8(e) construction industry proviso protects restrictive subcontracting clauses which

apply (a) to all existent and future jobsites regardless of whether the secondary union represents employees working at the jobsites; (b) regardless of whether the employer uses craft employees at the jobsites; (c) regardless of whether employees of the union subcontractors are actually working at the jobsites; (d) to jobsites where the secondary employer lacks contractual authority to determine whether other subcontractors are union; and (e) where affirmative evidence of jobsite friction between union and non-union employees is totally absent?

6. Whether the Court of Appeals misinterpreted NLRB v. Ironworkers, 434 U.S. 335 (1978) by holding, contrary to Section 8(f), that coerced efforts to obtain or enforce pre-hire agreements creates a collective bargaining relationship between the union and the picketed contractor?

7. Whether the Court of Appeals erred in construing Section 8(f) of the Act to permit labor organizations to seek by coercive means, prohibited by Section 8(b)(4)(A) of the Act, pre-hire agreements containing broad subcontracting restrictions?

8. May "contract standards" be protected by a union through coercive pressure to obtain a restrictive secondary agreement for the benefit of employees they do not yet represent?

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PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Donald Schriver, Inc. ("Schriver"), Sullivan-Kelly & Associates, Topaz Contracting & Development Company, Inc. ("Topaz"), and Sullivan and Associates,

hereby petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the District of Columbia Circuit, denying Petitioners' petition to review an order of the National Labor Relations Board.

ORDERS AND OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-59-a) is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. 60a-110a) is reported at 239 NLRB 264.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 115a-116a) was entered on October 20, 1980, pursuant to Section 10(f) of the National Labor Relations Act. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The relevant provisions of Sections 1, 7, 8(a), 8(b), 8(e), 8(f), 9(a), and 201 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§151, et seq.) are set forth in Appendix C (Pet. App. 111-a-114-a).

STATEMENT

I. THE STIPULATED FACTS

A. The Contractors Operations

Schriver is a construction industry builder-developer and general contractor in Montebello, California. Schriver directly employs carpenters as framers or roofers as needed and one laborer who performs clean-up work. Schriver subcontracts all other construction work to both union and non-union contractors through competitive bidding,[1] and has never employed any other craft employees.

At all relevant times, none of Schriver's carpenters have been members of nor represented by any labor organization. Nor has any labor organization attempted to organize them for purposes of collective bargaining.

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[1]In May, 1975 Schriver subcontracted about 70 percent of the non-carpentry construction work at its Montebello townhouse project to unionized contractors.

Topaz engages in construction work as a general contractor and subcontractor in Norwalk, California. In February, 1977 Topaz employed approximately 40 full-time employees, 38 of whom perform carpentry work. In addition, ten other employees perform carpentry work about 70 percent of the time. Topaz concurrently enters into subcontracts with various general contractors to perform carpentry work on different jobsites and allocates its carpentry employees accordingly. During February, 1977, for example, Topaz was the only non-union subcontractor at the Claremont, California jobsite where it employed between 10 and 20 carpenters for five weeks. At the Monterey Park, California jobsite the electrical work was also subcontracted to a non-union contractor. By early March, 1977 Topaz's regular compliment of carpenters and apprentices exceeded 80 employees working at additional jobsites in Santa Ana California, where only the concrete, plumbing, electrical, air conditioning and

heating installation were union. At other projects, Topaz hired entire new crews of carpenters on May 24, 1977 to perform work as a subcontractor on a shopping center in Whittier, California, and again on June 6, 1977 to perform carpentry work as a subcontractor in Duarte, California. At the Whitter jobsite, nineteen crafts were union and Topaz and six other crafts are not.

On at least one occasion in August, 1977, Topaz performed construction work as a general contractor building garages to be used as rental warehouses. All construction work was subcontracted and Topaz did not employ any carpenters to perform any work on this project.

Topaz has never executed or been a party to any labor agreement with any labor organization. None of Topaz's carpentry or apprentice employees have ever designated a labor organization to represent them for the purpose of collective bargaining.

B. The Trades Council and Local 1497 Threaten Schriver to Obtain Compliance With the Memorandum Agreement And the Local 1497 "Short Form" Agreement

Agreement

Since June 12, 1972 and continuing at all relevant times, Schriver has been signatory to a Memorandum Agreement with the Los Angeles Building and Construction Trades Council ("Trades Council"). The Memorandum of Agreement is a one-year contract,[2] which incorporates by reference the provisions of the Master Labor Agreement ("MLA"). The MLA is a three year agreement between the Los

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[2]Article IV of the Agreement provides:

> The Employer, Developer and/or Owner-Builder agrees that he shall contract or subcontract all jobsite work set forth in Article I above to a person, firm, partnership or corporation that is party to an executed, current Agreement with the appropriate Union having work and territorial jurisdiction, affiliated with the Council in which area the work is performed.

Angeles County District Council of Carpenters ("District Council") and its affiliated Carpenters Local 1497 and Local 1752 and various employer associations. Article I, Section 103, provides:

> The Contractor agrees that he or any of his subcontractors on the jobsite will not contract or subcontract work to be done at the site of construction, alteration, painting, or repair of a building, structure, or other work, except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body, affiliated with the Building and Construction Trades Department, AFL-CIO, or with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or an affiliate thereof.

This subcontracting clause applies at any time on any construction jobsite within the definition of the construction proviso to Section 8(e) of the National Labor Relations Act, where work within the jurisdiction of the Council, the District Council, Local 1497, and Local 1752 is

being performed, regardless of whether or not their members are present at any given time on any given site.

Section 103.1 defines a "subcontractor" and requires adherence to union standards wage rates.[3] Similarly, Section 103.2 requires all work performed to conform with the MLA provisions,[4] and Section 102.3 requires all

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[3]Section 103.1 provides: A subcontractor for the purposes of this Agreement. . . .
is defined as any person, firm or corporation holding a valid State Contractors' License and agrees under contract in writing with the Contractor or in writing with his sub- contractors to perform any work covered by this Agreement, and employs workmen as employees to perform services covered by this Agreement, including the performance of labor, and/or furnishing or installation of material, or the operation of equipment. All employees of subcontractors will perform work at the appropriate hourly rate and will be reported to such trust funds as required by the Agreement.

[4]Section 103.2 provides: All work performed by the Contractors or

subcontractors to observe the provisions of the MLA.[5]

Prior to May, 1975, neither the Council nor any of its affiliates, including the District Council, Local 1497, or Local 1752, attempted to enforce the clauses described above.

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subcontractors and all services rendered for the Contractors or subcontractors, as herein defined, shall be rendered in accordance with each and all of the terms and provisions hereof.

[5]This clause reads: If the Contractor or subcontractors shall subcontract jobsite work covered under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, including the furnishing and installation of material, performance of labor, and the operation of equipment, provision shall be made in written contract for the observance and compliance by his subcontractors with the full terms of this Agreement.

On May 22, 1975, Jim Sogoian, business representative of Local 1497, approached Schriver's superintendent on the Montebello townhouse project and asked him if the carpenters were "union." When Martin said they were not, Sogoian said Local 1497 would picket the jobsite unless Schriver signed the Carpenter's Short Form Agreement. Martin requested a copy of this agreement. Sogoian returned to the jobsite the next day with the Agreement and again stated Local 1497 would picket to obtain Schriver's signature on the Agreement.

About one week later Sogoian met Donald Schriver, President of Schriver, at the jobsite and told him Schriver was obligated to sign the Agreement, that the 1972 Memorandum Agreement signed by Schriver was still in effect, and that Schriver was thereby bound to the Local 1497 Agreement. Thereafter, Donald Schriver spoke with V.C. Mathis, business Representative of the District Council. Mathis said Schriver was obligated to sign

the Local 1497 contract, he rejected Schriver's offer to negotiate and confirmed that the Local 1497 would picket the Montebello jobsite and take legal action unless Schriver signed the Agreement.

On May 28, 1975, an agent of the Council, at the direction of Mathis, sent the following telegram to Donald Schriver:

> YOU SUBCONTRACTED CARPENTRY WORK TO CONTRACTORS WHO DO NOT HAVE AN EXECUTED AGREEMENT WITH ANY UNION AFFILIATED WITH THE COUNCIL. THIS ACTION ON YOUR PART VIOLATES ARTICLE IV OF YOUR AGREEMENT WITH THE COUNCIL DATED JUNE 12, 1972. UNLESS THE ABOVE-MENTIONED CONTRACTORS ARE IMMEDIATELY REMOVED FROM THE JOB, WE HAVE BEEN AUTHORIZED TO SUE YOU FOR AN INJUNCTION AND DAMAGES.[6]

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[6]No lawsuit was filed, and neither the Council nor Local 1497 engaged in any picketing against Schriver. Schriver did not comply with the Union's demands.

C. The Distict Council and Local 1752 Picket Topaz to Secure Compliance With MLA

On or about February 22, 1977, Larry Ruiz, a business representative of Local 1752, spoke to Lonnie Tackett, Topaz's construction foreman at the Claremont, California project. Ruiz asked why Topaz was not signed up with Local 1752. Ruiz said Local 1152 would have to picket if Topaz did not sign the contract. Topaz's labor relations consultant, Mike Sullivan, arrived at the jobsite while Ruiz was still there and asked Ruiz what contract he had to sign. Sullivan asked Ruiz if he meant the regular carpenters' contract with the Master Labor Agreement, and Ruiz replied, "Yes, that is the only contract that I can sign with Topaz." Sullivan said the contract was illegal, but that he was willing to sign the contract for the Claremont townhouses jobsite only, if Local 1752 would accept all the men working for Topaz and stop interfering with the owner-builders. Ruiz replied that he could not accept Sullivan's

conditions and could not sign any contract other than the Master Labor Agreement.

On February 28, 1977, at a jobsite meeting with Ruiz and Robert Wiess, attorney for the Claremont townhouses owner-builder Medvin-Norris, Joe Eickholt, business representative of the District Council, informed Sullivan that Local 1752 could not accept a contract limited to the Claremont project.

In furtherance and support of their demands, Local 1752 and District Council picketed the Claremont construction project from March 4, to March 14, 1977, with signs, reading:

Topaz Contracting & Dev.
UNFAIR
to
Carpenters
Local 1752
Affiliated With The
Los Angeles Building and Construction
Trades Council
No Agreement

In late May, 1975, Petitioners filed the Section 8(e) and 8(b)(4)(ii)(A) charges,

as amended in March, 1977 upon which this case arises.[7]

II. DECISIONS AND ORDERS BELOW

A. The Board's Decision and Order

The Board concluded that the Union's coercive attempts to obtain initial execution of broad restrictive subcontracting clauses were privileged by the construction industry proviso to Section 8(e). Despite its acknowledgement that no labor organization had achieved majority designation as the collective bargaining agent of any of Petitioners' carpentry employees, the Board construed the proviso to Section 8(e) to encompass

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[7]Pursuant to agreement, the case was transferred directly to the Board for decision. On September 7, 1977, the issues were submitted upon the parties' pleadings, exhibits and factual stipulations. On December 4, 1977, the Board granted the joint motion and transferred these cases for issuance of a decision and order. No jurisdictional issues are presented.

all subcontracting clauses, regardless of scope, "sought in the context of collective-bargaining relationships. . . ." (Pet. App. 81-a). The Board further broadly defined "collective bargaining relationships" to include union attempts to obtain employer agreement to "pre-hire" agreements even by coercive means, regardless of the wishes of current affected employees (Pet. App. 88-a et seq).

The Board considered Connell Constr. Co. v. Plumbers, Local 100, 421 U.S. 616 (1975) to support the broad scope given the construction industry proviso to Section 8(e) and its view that an attempt to obtain agreement to a "pre-hire" contract creates a "collective bargaining relationship" (Pet. App. 90-a).

The Board rejected the contention that the construction industry proviso privileges subcontracting clauses limited to particular jobsites where friction exists between union and non-union employees and where signatory employers

are actually working, restricted to those employers signatory to agreements with one craft union, and enforceable only after the designation by a majority of the affected employees of the signatory union as their collective bargaining relationship (Pet. App. 80-a-81-a).

B. The Decision of the Court of Appeals

The Court of Appeals (Circuit Judges McGowan and Edwards and Judge Kashiwa, of the Court of Claims sitting by designation) affirmed the Board's dismissal of Petitioners' Section 8(e) and 8(b)(4)(ii)(A) complaint. The Court of Appeals agreed with the Board that an attempt to obtain a pre-hire agreement lawful under Section 8(f) including restrictive subcontracting clauses creates the requisite "collective bargaining relationship" within the meaning of this Court's Connell decision. The Court of Appeals also held that "it is irrelevant that . . . the union lacks majority status" (Pet. App. 28-a), even though the

panel recognized "that one of the major aims of the 1959 amendments to the NLRA, of which §8(e) was one, was to limit 'top down' organizing campaigns"((Pet. App. 27-a)) and that "an 8(f) agreement is not identical in all respects to a standard 9(a) collective bargaining agreement" (Pet. App. 33-a).

The Court of Appeals also refused to follow an intervening panel decision of the Ninth Circuit[8] which held that the construction industry proviso privileges subcontracting restrictions limited to specific jobsites where signatory union employees are employed (Pet. App. 37-a). Instead, the Court of Appeals viewed Section 8(e) as broadly protecting "continuity of work and benefits" for construction employees beyond any concern to insulate union

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[8]Pacific Northwest Chapter of the Associated Builders & Contractors Inc. v. NLRB, 609 F.2d 1341 (1979) pending rehearing en banc.

workers from working alongside non-union employees at particular jobsites id.[9]

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The decision of the Court of Appeals creates a rule of law under Section 8(e) that is contrary to earlier decisions of this Court and effectively nullifies the Act's paramount guarantee in Section 7 preserving for all employees, including construction employees, freedom of choice in their selection of a collective bargaining representative. The decision below has far-reaching adverse consequences upon the free exercise of employee rights unintended by Congress.

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[9]The Court of Appeals enforced that portion of the Board's decision declaring certain "self-enforcement" provisions of MLA violative of Section 8(e). This portion of the Board's order is uncontested on this Petition.

By permitting construction unions to coercively obtain broad subcontracting restrictions limiting work to craft unions from unorganized employers, without first or even concurrently organizing their employees, the Court of Appeals reverses Congress' legislative judgment that the construction provision to Section 8(e) privileges only voluntary subcontracting restrictions unenforceable thereafter until the construction union obtains majority designation.

The rule of law upheld below authorizes construction unions to obtain by threats of jobsite picketing and by such picketing coerced employer assent to subcontracting restrictions and other union imposed conditions of employment upon non-union workers regardless of their wishes, thereby permitting minority unions to use subcontracting clause to obtain prohibited "top down" organizing in the construction industry. Such clauses have the direct consequence of forcing non-union employees to become union

members to secure the employment opportunities restricted to employees of unionized contractors.

Unless the petition is granted fundamental statutory rights of construction employees to select or not their own collective bargaining representative and of construction employers to be free from subcontracting restrictions sought by stranger unions will be nullified.

The decision below also threatens the cost-conscious process of competitive bidding in one of our Nations largest industries. Craft unions can now establish exclusive control over all construction work within their jurisdictions and are free to picket job sites where non-union employees perform any craft work. It is of fundamental importance to all contractors and users of construction services that job site competitive bidding not be foreclosed in this depressed industry.

The Board recognized the significance of the issues presented here by holding an unprecedented seven hours of oral argument by all interested parties, including the AFL-CIO, international craft unions, the Chamber of Commerce, contractors associations, and individual contractors. It is in the interests of contractors, users, and the Nation that the legal issues posed be promptly resolved by the highest authority.

II. THE COURT OF APPEAL'S DECISION THAT COERCIVE ATTEMPTS TO OBTAIN EMPLOYER ASSENT TO "PRE-HIRE" CONTRACTS CREATES A "COLLECTIVE BARGAINING RELATIONSHIP" IS CONTRARY TO DECISIONS OF THIS COURT

In Connell Constr. Co. v. Plumbers, Local 100, 421 U.S. 616 (1975), this Court concluded that the scope of construction industry proviso can not supplant or override the primary purpose of the National Relations Act expressed in Section 7 to protect the right of all employees to "bargain collectively through representatives of their own choosing."

29 U.S.C. §157. Speaking for a majority of the Court, Mr. Justice Powell recognized that unless subcontracting restrictions could only be sought inside "the context of a collective-bargaining relationship" and applicable only "to a particular jobsite" (421 U.S. at 635), "construction unions [would attain] an almost unlimited organizational weapon." 421 U.S. at 631. Consistent with the paramount purpose of Sections 7 and 9(a) of the Act guaranteeing employees freedom of choice from both employer and union interference in their selection or rejection of a collective bargaining representative, this Court was "unwilling to read the [Section 8(e)] construction industry proviso . . . to leave such a glaring loophole in (Congress') restrictions on 'top-down' organizing . . ." 421 U.S. at 633.

The Court effectuated the legislative scheme by concluding that the proviso authorized subcontracting restrictions in the construction industry steming from

collective bargaining relationships. The dissenting Justices did not object to this portion of the Court's decision. In their view, the National Labor Relations Act, rather than the Sherman Anti-Trust Act, provided the remedy for the adverse economic consequences of subcontracting restrictions sought outside a collective bargaining relationship.

In Connell a collective bargaining relationship describes an ongoing relationship between a labor organization and a construction employer whose employees have previously indicated by majority vote in a Board conducted election, or by reliable and uncoerced union security or union bargaining authorization designations that the union seeking to restrict the employer's subcontracting freedom is their choice as a collective bargaining representative. Otherwise Congress' concern in the 1959 amendments to the Act to limit "top down" organizing and preserve employee freedom

of choice in the construction industry could still be frustrated.

This Court has consistently applied this definition in earlier decisions. In National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 614 (1967), the Court used the phase "collective bargaining relationship" to describe an ongoing relationship between Frouge, a general contractor, and the carpenters international union to employ members of a carpenters local where the work would be performed. See 149 NLRB at 653. At each jobsite where members were working, the union enjoyed at least a presumption of majority status, thereby privileging the union's work preservation demands because the demand arose in the context of a collective bargaining relationship during which the affected craft employees had indicated by their maintenance of union membership that the carpenters local was their choice of bargaining representative statutorily authorized to make such restrictive demands upon Frouge.

Historically, this Court has consistently recognized that work preservation and subcontracting demands are legitimate only if the demanding labor organization is the certified bargaining representative or otherwise legally entitled to the presumption of a majority status. In the first case holding an employer legally required to bargain over such demands, the steelworkers had been the exclusive bargaining representative of the affected employees since 1937. Fibreboard Paper Prods. v. NLRB, 379 U.S. 203, 205 (1964). This Court's decision in Houston Insulation Contractors Ass'n v. NLRB, 386 U.S. 664 (1967) is likewise founded upon a work preservation claim advanced by Asbestos Workers, Local 22 which had previously been selected as the bargaining representative of Armstrong's employees.

Here, it is uncontested that the Trades Council, the District Council, and Carpenters Locals 1497 and 1752 have never attempted to organize Schriver's or

Topaz's carpentry employees or to obtain membership designations from them. It is stipulated that none of Schriver's or Topaz's carpentry employees were members of Carpenters Locals 1497 or 1752. The restrictive contract demands made by picketing and threats of picketing did not arise against the background of an ongoing organizing campaign involving Schriver's or Topaz's employees or of any non-union carpentry employees working for other contractors. There is then no record support for the Court of Appeal's assertion that "the unions . . . explicitly sought to secure representation of Schriver's Topaz' employees." (Pet. App. 29-a) (emphasize in original). The Unions simply ignored these employeees in seeking identical subcontracting restrictions sought by Local 100 in Connell. Just as Local 100 ignored the employees of the non-union subcontractors by seeking subcontracting restrictions from general contractors, the Unions here ignored the collective bargaining agent

preferences of Schriver's and Topaz's employees.

Contrary to the view of the Court of Appeals (Pet. App. 30-a), a coercive attempt to standardize the working conditions of Schriver's and Topaz's employees without their prior consent does not render "the overriding concern of the Supreme Court in Connell . . . entirely inapplicable." This Court's concern there was to preserve the very heart of the Act, which guarantees employees the right to decide which union, if any, they wish to designate as their collective bargaining agent. Hill v. Florida, 325 U.S. 538, 541 (1945); J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944); NLRB v. Indiana & Mich. Elec. Co., 318 U.S. 9, 19 (1943); IAM v. NLRB, 311 U.S. 72, 79 (1940) ("freedom of choice . . . is the essence of collective bargaining"). Coercive attempts to standardize wages by direct pressure solely upon the employer without even attempting to organize the employees is the very evil Congress sought to limit in

the 1959 Landrum-Griffin amendments to the Act. The fact that Topaz and Schriver employed workers who could be organized and represented by the Carpenters renders their being ignored even more offensive to the Act's freedom of choice guarantee than the conduct of Local 100 in Connell. "Congressional concern about coerced designation of bargaining agents did not evaporate as the focus turned to the construction industry." NLRB v. Iron Workers, 434 U.S. 335, 347-48 (1978).

Petitioners agree with the Court of Appeals (Pet. App. 45-a) that construction industry employees have an interest in job security. However, the Court below ignores the basic scheme of the Act by permitting the Unions to assert this interest without the employees prior consent. The Court of Appeals and the Board exaggerate the alleged difficulties of organizing Schriver's and Topaz's carpentry employees. Both employers hired stable work forces who enjoyed continuing employment. These employees then were no

less accessible to solicitation at work or in their homes than industrial or retail employees. The burden of proving inaccessibility is on the organizing union. Sears, Roebuck and Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 205 (1978). The Unions never attempted to organize the employees, and thus can not complain about lack of access to the employees. Hutzler Bros. Co. v. NLRB, 630 F.2d 1012, 1017 (4th Cir. 1980). The record then contains no support for the concerns expressed by the Court of Appeals.[10]

The Court of Appeals also improperly subordinated Section 8(e) and 8(a)(4)(A) to Section 8(b)(7). Whether the Union's conduct is subject to 8(b)(7) begs the question of whether the subcontracting clause, which was the Unions' primary

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[10]Nor did Congress. Only where employment terms were of short duration did the Congress perceive organizing difficulties (Pet. App. 32-a).

objective, is outside the Section 8(e) construction proviso. As the Court of Appeals properly stated (Pet. App. 20-a):

> If an agreement is prohibited by §8(e), §8(a)(4)(A) the Act prohibits any picketing or threats of picketing aimed at coercing an employer to enter the agreement.

Therefore, even assuming recognitional object within the scope of Section 8(b)(7), that section is irrelevant to the scope of the construction industry proviso to Section 8(e).

As we have shown above, the proviso protects subcontracting restrictions in the context of a collective bargaining relationship established after the union obtains majority status or the presumption thereof. The fact that the subcontracting clause is part of a short form agreement alluding to other terms and conditions of employment does not remove the subcontracting clause from Section 8(e) or remit the coerced employer to the protection only of Section 8(b)(7). There

is nothing in this Court's holding and reasoning in NLRB v. Iron Wkrs., supra, which suggests Section 8(b)(7) is the sole proscription upon "top down" recognition. By holding to the contrary, the Court of Appeals improperly repealed Section 8(a)(4)(A) and misinterpreted its holding in Dallas Bldg & Constr. Trades Council v. NLRB, 396 F.2d 677 (1968), which recognized that Section 8(e) unlike Section 8(b)(7) prohibits secondary "hot cargo" clauses regardless of whether the union seeks recognition. "Sections 8(b)(7) and 8(e) are aimed at wholly different problems." 396 F.2d at 682. In Dallas, Plumbers, Local 100 sought an unchallenged subcontracting clause, and the Court of Appeals in its opinion nowhere suggested that picketing and threats thereof to obtain unlawful subcontracting clauses could only be interdicted under Section 8(b)(7).

III. THE COURT OF APPEALS DECISION THAT COERCIVE ATTEMPTS TO OBTAIN PRE-HIRE AGREEMENTS CREATE A "COLLECTIVE BARGAINING RELATIONSHIP" IS CONTRARY TO LEGISLATIVE INTENT AND A DECISION OF THIS COURT

Section 8(f) of the Act exempts the execution of a "pre-hire" agreement in the

construction industry from the reach of Section 8(a)(2), which prohibits employer support for any labor organization which does not actually represent an uncoerced majority of the affected employees. Garment Wkrs. Union v. NLRB, 366 U.S. 731, 738-39 (1961) (§8(a)(2) broadly protects freedom of choice and majority rule in employee selection of bargaining representative). The mere execution of a pre-hire agreement and, a fortiori, the coerced attempted here to obtain initial assent to a pre-hire agreement does not, contrary to the Court of Appeals (Pet. App. 28-a), create a collective bargaining relationship which ipso facto places subcontracting restrictions within the protection of the Section 8(e) construction industry proviso.

In NLRB v. Iron Wkrs, supra, this Court carefully canvassed the legislative history leading to the

enactment of Section 8(f). The Court concluded Congress' limited purpose was to privilege the execution of such agreements but, consistent with the paramount federal policy of the Act to protect employee free choice of bargaining agent, a pre-hire agreement did not acquire the status of a binding collective bargaining contract until and unless the signatory construction union later obtained the majority support of the affected craft employees 434 U.S. at 346. Neither Section 8(f) on its face nor the relevant legislative history contains any support for the view of the Court of Appeals (Pet. App. 34-a) that an attempt to obtain a pre-hire agreement creates a collective bargaining relationship.[11]

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[11] The Board's view, affirmed by the Court of Appeals, is inconsistent with its earlier view expressed in Dee Cee Floor Covering, Inc., 232 NLRB 421, 422 (1977) (§8(f) "merely immunizes the parties to such agreements from liability under Section 8(a) (and (b) of the Act").

The same proposition, that a pre-hire agreement creates a collective bargaining relationship subject to judicial enforcement under Section 301 of the Act advanced by the AFL-CIO[12] in Iron Wkrs, was specifically rejected by this Court. 434 U.S. at 352. As Mr. Justice Stewart stated, in dissent: "an employer may dismiss the [pre-hire] agreement as a nullity." 434 U.S. at 353.

The contrary holding below further ignores the limited justification for pre-hire agreements: to enable employers to submit accurate bids,[13] not to

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[12] Brief for AFL-CIO Amicus Curiae at 10-13. NLRB v. Iron Wkrs, 434 U.S. 335 (1978).

[13] S. Rep. No. 187, 86th Cong. 1st. Sess. 28 (1959), reprinted I Leg. Hist. of LMRDA 1959 p. 424.

confer upon construction unions an unlimited recognition weapon in contravention of Congress' concurrent overriding purpose in 1959 to proscribe "top down" recognition tactics. The Court of Appeals has improperly converted Section 8(f) into a "top down" recognition mechanism which forfeits the public right of all employees to determine their own terms and conditions of employment. As Judge Learned Hand observed: "Obviously, the authority of such a union cannot extend to any . . . subject matter which the union has not been specifically authorized to 'adjust'." Douds v. Local 1250, Retail Store Union, 173 F.2d 764, 769 (2d Cir. 1949).

Here, it is stipulated that the Unions have not attempted to obtain majority status among Schriver's or Topaz's regular complement of carpentry employees. Accordingly, a pre-hire agreement does not alone create a

collective bargaining relationship under the National Labor Relations Act.[14]

The Court in Connell also rejected the argument by Plumbers Local 100 that pre-hire agreements create a collective bargaining relationship. This Court

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[14]The distinction between a pre-hire "agreement" and an on-going collective bargaining relationship established under Section 9(a) of the Act is confirmed by statutory comparison. Section 8(f) of the Act does not contain a single reference to the term "collective bargaining agreement" or "collective bargaining relationship." The language speaks only in terms of "agreements." The first proviso to Section 9(a) (Stat. App. 114-a)in contrast, describes the type of agreement which follows after the establishment of majority status as a "collective bargaining contract or agreement." In Section 9(a), where the word "agreement" is used in close association with "collective bargaining contract" rather than alone, its scope can properly be ascertained from the limiting words which precede it. If Congress had intended the same type of bargaining relationships to be created by both sections, it likely would have used identical terminology in Section 8(f).

stated that pre-hire agreements could be challenged as invalid "for lack of a collective-bargaining relationship." 421 U.S. at 631 n. 10. The Court did not believe that Congress intended unenforceable pre-hire agreements to constitute a collective bargaining relationship because such agreements offer no protection against "top down" recognition tactics. This Court, unlike the Court of Appeals, was fully faithful to the distinction drawn by Congress in 1959 between pre-hire "agreements" and enforceable collective bargaining contracts premised upon majority designation of a bargaining agent.

The Unions here forefeited any claim to lawful pre-hire agreements not only by failing to obtain majority support but also by violating Congress' proscription against coercive attempts to obtain employer assent to pre-hire agreements. As this Court noted in NLRB v. Iron Wkrs., supra, 434 U.S. at 348 n. 10: "Congress was careful to make its intention clear

that pre-hire agreements were to be arrived at voluntarily, and no element of coercion was to be admitted into the narrow exception being established to the majority principle" (citing 105 Cong. Rec. 18128 (1959) (remarks of Rep. Barden); H.R. Rep. No. 1147, 86th Cong., 1st Sess. 42 (1959)). Even if a pre-hire contract created a collective bargaining relationship, such a relationship may not lawfully be created by picketing and threats of picketing. The contrary view of the Court of Appeals encourages the very type of coercive conduct condemned by Congress in 1959, and undermines and subverts the policy of Section 1 of the Act "to eliminate the causes of certain substantial obstructions to the free flow of commerce. . . ." (Stat. App. 111-a). See also Section 201(c) (Stat. App. 114-a). The Court of Appeals has granted construction unions unfettered coercive means to obtain employer recognition in contravention of the Acts freedom of choice principle. This dramatic departure

from federal labor policy requires review by this Court.

IV. THE DECISION BELOW THAT THE CONSTRUCTION INDUSTRY PROVISO PROTECTS SUBCONTRACTING CLAUSES REGARDLESS OF SCOPE IS CONTRARY TO THIS COURT'S CONNELL DECISION

In Connell, supra, this Court defined the scope of the Section 8(e) construction industry proviso to privilege restrictive subcontracting clauses only if sought in the context of a collective bargaining relationship and applicable to a particular jobsite. 421 U.S. at 635. On its face, Section 102 of MLA applies to all current and future jobsites, even those commenced after expiration of the contract whenever Topaz or Schriver engage in construction and regardless whether either contractor uses craft employees at the jobsite who could be organized by a particular craft union. The restrictions further include jobsites where Topaz, like Connell, performs construction work as a

general contractor and employs no employees at the jobsite which any craft union could organize.[15] Section 102 of MLA has precisely the improper "top down" organizing effect condemned in Connell. And Schriver is restricted from subcontracting any construction work to non-union companies regardless of whether Schriver employs any craft employees at a particular jobsite.[16]

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[15]In August, 1977 Topaz was general contractor at a warehouse project owned by Joseph Von Rathjen Investment Co. of Los Angeles.

[16]On the Montebello townshouse project, Schriver subcontracted the insulation, plaster, drywall, painting, paving, finished carpentry, sheetmetal, heating, masonry and formica work. About 30 percent of this work was contracted to non-union concerns.

As applied to Topaz, the effect upon non-union subcontractors to sign contracts with craft unions regardless of the wishes of their employees is precisely the effect of Local 100's demand upon Connell. There, as here, such unrestricted subcontracting prohibitions impermissably encourage union recognition by unorganized contractors to maintain their elgibility to bid on work made available by Schriver and Topaz--the very direct effect upon non-union contractors condemned in Connell. The Court of Appeals ignored this "top down" recognition consequence. This Court must once again, as it did in Connell, correct this misconception of the construction industry proviso.[17] As

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[17]The Court of Appeals (Pet. App. 42-a) relied upon "evidence that the pattern of collective bargaining in the construction industry in 1959 included subcontracting agreements such as those present in this case." The Board, however, did not rely upon any such "evidence" in concluding Section of MLA was not void for overbreadth (Pet.

this Court previously held, Congress intended to permit subcontracting restrictions only where fully consistent with the exercise of employee free choice, not to create a loophole to "top down" organizing restrictions. Connell Constr. Co. v. Plumbers Local 100, 421 U.S. at 632.

V. THE DECISION BELOW IS CONTRARY TO A PANEL DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In Pacific Northwest Chapter, etc. v. NLRB, 609 F.2d 1341 (1979), a unanimous

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App. 60a-110-a). The Court of Appeals acted in disregard of a fundamental rule of administrative law by affirming the Board upon a basis not relied upon by the agency. Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962)

The stipulated record before the Court of Appeals demonstrates that restrictive subcontracting provisions were present in less than 10 percent of nationwide construction industry contracts as of 1959. Congress cannot be fairly imputed with an intent to preserve "a pattern" which was in fact the exception rather than the rule.

panel of the Ninth Circuit held that the Section 8(e) construction industry proviso shelters subcontracting restrictions only if demanded in circumstances where the signatory craft union represents the craft employees of the signatory construction employer[18] and the clause applies to particular jobsites where employees members of the signatory employer are at work. 609 F.2d at 1347. The Ninth adopted a view of the Section 8(e) construction industry proviso fundamentally

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[18]Woekle & Romero employed carpenters who were members of various Carpenters Locals. The 200 employer members of the Oregon-Columbia Chapter of AGC employ members of Operating Engineers, Local 701.

Both Carpenters Locals and Local 701 sought employer agreement to restrictive subcontracting identical in scope to Section 103 of MLA.

at odds with the Court below,[19] which specifically "refus[ed] to follow the holding of the panel of the Ninth Circuit" (Pet. App. 49-a). It is essential then that the Court accept this opportunity to resolve the existing conflict over the scope of the construction industry proviso between the Ninth and District of Columbia Circuits. Rule 17.1(a) R. Sup. Ct.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the United States Court of Appeals for the District of Columbia should be granted.

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[19] In granting the rehearing petition on August 19, 1980, the Ninth Circuit withdrew "the previous three-judge panel assignment." This order did not withdraw the panel's unanimous opinion.

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Appendix A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2177

DONALD SCHRIVER, INC., SULLIVAN-KELLEY & ASSOCIATES, TOPAZ CONTRACTING & DEVELOPMENT COMPANY, INC., AND SULLIVAN AND ASSOCIATES, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENTS

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL, CARPENTERS LOCAL NO. 1497, *et al.*, INTERVENORS

No. 79-1001

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOS ANGELES BUILDING AND CONSTRUCTION TRADES COUNCIL, *et al.*, RESPONDENTS

DONALD SCHRIVER, INC., *et al.*, INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Petition for Review and Application for Enforcement of an order of the National Labor Relations Board

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Judgment entered this date

Argued June 17, 1980
Decided October 20, 1980

Gerard C. Smetana with whom *William H. DuRoss, III* was on the brief for Schriver Inc., Petitioner in No. 78-2177 and Intervenor in No. 79-1001.

John H. Ferguson, Attorney, National Labor Relations Board with whom *William A. Lubbers*, General Counsel, *John E. Higgins*, Deputy General Counsel, *Robert E. Allen*, Acting Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel and *William M. Bernstein*, Attorney, National Labor Relations Board were on the brief for Respondent in No. 78-2177.

Laurence J. Cohen with whom *William Chapman, George Kaufmann, Robert D. Kurnick* and *Laurence Gold* were on the brief for Los Angeles Building and Construction Trades Council, Intervenor in No. 78-2177 and Respondent in No. 79-1001.

Leo Geffner for Carpenters Local No. 1497, et al., Intervenors in 78-2177 and Respondents in No. 79-1001.

Vincent J. Apruzzese, Stephen A. Bokat, Lawrence B. Kraus, and *Francis A. Mastro* were on the brief for the Chamber of Commerce of the United States, Amicus Curiae in Nos. 78-2177 and 79-1001.

Kenneth C. McGuiness, Robert E. Williams and *Daniel R. Levinson* were on the brief for Air Conditioning & Refrigeration Institute, et al., Amicus Curiae in Nos. 78-2177 and 79-1001.

Robert J. Hickey and *Peter G. Kilgore* were on the brief for Associated General Contractors of America Inc., Amicus Curiae in Nos. 78-2177 and 79-1001.

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Before: McGOWAN and EDWARDS, *Circuit Judges*, and KASHIWA,* *Judge*, United States Court of Claims.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: We are called upon in this case to review a decision and order of the National Labor Relations Board concerning the legality of certain subcontracting agreements in the construction industry, in light of the construction industry proviso to §8(e) of the National Labor Relations Act. Three principal issues are raised.

The first issue presented is whether subcontracting agreements in the construction industry are lawful if sought as part of a "prehire agreement" authorized by §8(f) of the Act. The resolution of this issue turns on the meaning to be ascribed to the decision in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), where the Supreme Court held that a subcontracting agreement may only be sought in the context of a "collective-bargaining relationship." The second issue presented concerns the proper scope of the construction industry proviso to §8(e). In particular, we are called upon to consider whether subcontracting agreements in the construction industry must be negotiated on a jobsite by jobsite basis or, if not, whether they must at least be limited in application to particular jobsites at which both union and nonunion workers are employed. Also raised as a part of this second issue is the question whether subcontracting agreements lawfully may require subcontractors to be signatory to an agreement with a "particular" union. The third and final issue presented is whether subcontracting agreements may be included in a contract that also authorizes the union to take "any" action to enforce "any" settlement or decision rendered pursuant to a contractual grievance and arbitration procedure.

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* Sitting by designation pursuant to 28 U.S.C. §293(a)(1976).

We hold that subcontracting agreements may be included in a "prehire agreement" between a contractor and a labor organization in the construction industry. In addition, we hold that such agreements need not be renegotiated at each jobsite or limited in application to particular jobsites at which both union and nonunion workers are employed; we also hold that such agreements may be "union-specific." Finally, we hold that a subcontracting agreement may not be included in a contract such as the present that authorizes the union to take "self-help" measures to enforce the agreement.

We turn to consider each of these issues in detail.

I. Factual and Procedural Background

On June 20, 1975 and on March 9, 1977, unfair labor practice charges were filed alleging that certain labor organizations had improperly coerced two construction contractors to enter into subcontracting agreements prohibited by §8(e) of the National Labor Relations Act.[1] The charges filed on June 20, 1975 stemmed from incidents involving Donald Schriver, Inc. ("Schriver"); the charges filed on March 9, 1977, and amended on March 15, 1977, stemmed from incidents involving Topaz Contracting and Developing Co., Inc. ("Topaz"). Complaints were issued by the Regional Director in each case and, on April 28, 1977, the two cases were consolidated. App. 39.[2] The Re-

[1] On June 20, 1975, two charges were filed by Sullivan-Kelley & Associates against the Los Angeles Building and Construction Trades Council and Local 1497, United Brotherhood of Carpenters and Joiners of America. Joint Appendix (App.) 5, 7. On March 9, 1977, one set of charges was filed by Sullivan and Associates against the Los Angeles County District Council of Carpenters and Local 1752, United Brotherhood of Carpenters and Joiners of America. App. 23. The charges filed on March 9, 1977 were amended on March 15, 1977. App. 25.

Section 8(e) is set forth in full, *infra*, at note 5.

[2] "App." refers to the Joint Appendix submitted by the parties.

gional Director issued a consolidated amended complaint on July 6, 1977. App. 41.

The parties waived all proceedings before an Administrative Law Judge, and submitted a motion to transfer the case directly to the National Labor Relations Board. App. 52. At the same time the parties entered into a complete stipulation of facts. App. 55. On November 4, 1977 the Board granted the motion to transfer, and the case was heard on the following stipulated facts.

A. *The Facts Involving Donald Schriver, Inc.*

Donald Schriver, Inc. is a developer and general contractor in the building and construction industry in southern California. App. 57, ¶ 7(a).[3] Schriver falls within the territorial jurisdiction of the Los Angeles Building and Construction Trades Council ("Trades Council") and Local 1497, United Brotherhood of Carpenters and Joiners of America ("Local 1497"). Schriver directly employs only carpenters and one full time laborer. All other jobsite work assumed by Schriver is subcontracted to other contractors. App. 62, ¶ 14.

In June of 1972, Schriver was engaged as owner-builder in the construction of a four-unit apartment complex in Montebello, California. App. 62, ¶ 15. While working on that project, Schriver entered into a standard agreement with the Trades Council. That agreement contained certain general terms and, more importantly, also incorporated by reference the Master Labor Agreement ("MLA") entered into between various employer associations and the Los Angeles County District Council of Carpenters ("District Council"), of which Local 1497 was a member. App. 61, ¶ 11(a).

By its terms, the 1972 agreement between Schriver and the Trades Council was to remain in effect for one year,

[3] References are to the stipulation of facts submitted by the parties to the Board, reprinted in the Joint Appendix and designated by numbered paragraphs.

with automatic yearly renewals thereafter subject to proper notice of cancellation by either party. Schriver has never served the requisite notice of cancellation upon the Trades Council, and at all material times has been signatory to the above contract. App. 61, ¶ 11(b)-(c). At no time have the employees of Schriver specifically designated the Trades Council or any of its affiliated unions as their collective bargaining representative. App. 61, ¶ 11(d).

The parties in the instant dispute appear to be in agreement that the 1972 contract was a "prehire agreement" and that such agreements are recognized by §8(f) of the National Labor Relations Act.[4] The parties disagree,

[4] 29 U.S.C. § 158(f)(1976). That section provides:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall

however, with respect to the legality of certain terms included within the 1972 contract. One such clause is Article IV of the 1972 agreement between Schriver and the Trades Council, which contained the following subcontracting provision:

> The Employer, Developer and/or Owner-Builder agrees that he shall contract or subcontract all jobsite work set forth in Article I above to a person, firm, partnership or corporation that is party to an executed, current Agreement with the appropriate Union having work and territorial jurisdiction, affiliated with the Council in which area the work is performed.

App. 61, ¶ 12. Another such clause is Article I, section 103 of the MLA, incorporated by reference into the 1972 contract, which provided:

> The Contractor agrees that he or any of his subcontractors on the jobsite will not contract or subcontract work to be done at the site of construction, alteration, painting or repair of a building, structure, or other work, except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body, affiliated with the Building and Construction Trades Department, AFL-CIO, or with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or an affiliate thereof.

App. 60, ¶ 10.

The parties stipulated that the provisions of the MLA applied at any time and at any jobsite where work within the jurisdiction of the unions was performed, regardless of whether or not any union members were present at that jobsite. App. 87, ¶ 85. The contractor thus could not avoid the applicability of the subcontracting clause by using only nonunion labor.

In addition to the disputed subcontracting clauses, the parties also disagree as to the legality of Article III, sec-

> not be a bar to a petition filed pursuant to section 159(c) or 159(e) or this title.

tion 306 of the MLA, which authorized the union to take "any" action to enforce awards or resolutions obtained through the grievance and arbitration process. Section 306 provided that:

> Nothing contained in this Agreement, or any part thereof, shall affect or apply to the Union in any action it may take against any Contractor or subcontractor who has failed, neglected or refused to comply with or execute any settlement or decision reached at any step of the grievance procedure or through Arbitration under the terms of Article V hereof. . . .

App. 60, ¶ 10.

After signing the 1972 agreement, Schriver did not employ union carpenters, and did not require the subcontrators on its jobsites to be union subcontractors. App. 62, ¶ 16. Although Schriver completed several large and small construction projects from 1972 to May of 1975, at no time did any union representative protest to Schriver's management the failure to abide by the agreement. There was no evidence, however, that the unions had notice of such projects. App. 63, ¶ 19.

In May of 1975, Schriver was engaged in the construction of a townhouse project in Montebello, California. On that project Schriver employed carpenters who performed work within the craft jurisdiction of Local 1497, but who were neither members of, nor represented by, Local 1497. App. 63, ¶ 20. On the Montebello townhouse project, Schriver contracted with several subcontractors, approximately 30 percent of which were not signatories to contracts with appropriate labor organizations. At certain times some crafts worked alone on the project; at other times several crafts worked on the project simultaneously. App. 63, ¶ 21.

On May 22, 1975, Jim Sogoian, a business representative of Local 1497, approached Schriver's superintendent on the townhouse project. Sogoian asked whether the carpenters on the job were "union," and was told that they

were not. Sogoian informed the superintendent that Local 1497 would picket the jobsite if Schriver did not sign the carpenters' agreement. App. 66, ¶ 22. That agreement included the standard subcontracting clauses referred to above.

Subsequently, negotiations were conducted between the union and Schriver over the employment of carpenters at the Montebello site. Management officials at Schriver were told by union representatives that the contractor was legally bound by the 1972 agreement with the Trades Council to sign the carpenters' contract. Donald Schriver, president of Schriver, Inc., attempted to obtain different terms to the contract, but the union representatives insisted that Schriver sign the standard carpenters' agreement. Union officials again threatened to picket if Schriver did not sign the contract. App. 66, ¶ 25.

On May 28, 1975, the Trades Council sent the following telegram to Schriver:

> YOU SUBCONTRACTED CARPENTRY WORK TO CONTRACTORS WHO DO NOT HAVE AN EXECUTED AGREEMENT WITH ANY UNION AFFILIATED WITH THE COUNCIL. THIS ACTION ON YOUR PART VIOLATES ARTICLE IV OF YOUR AGREEMENT WITH THE COUNCIL DATED JUNE 12, 1972. UNLESS THE ABOVEMENTIONED CONTRACTORS ARE IMMEDIATELY REMOVED FROM THE JOB, WE HAVE BEEN AUTHORIZED TO SUE YOU FOR AN INJUNCTION AND DAMAGES.

App. 67, ¶ 26. Despite warning, Council officials did not bring suit to enforce the 1972 agreement, and they did not cause any persons to engage in any picketing against Schriver. *Id.* Nevertheless, unfair labor practice charges were filed on the basis of the *threats* of picketing.

B. *The Facts Involving Topaz Contracting and Developing Co., Inc.*

Topaz Contracting and Developing Co., Inc., is a California corporation engaged as a framing and carpentry

contractor and general developer in the building and construction industry in southern California. App. 58, ¶ 8(a). Topaz falls within the territorial jurisdiction of Local 1752, United Brotherhood of Carpenters and Joiners of America ("Local 1752"). On February 21, 1977, Topaz began carpentry work on a townhouse project in Claremont, California. App. 67, ¶ 27. All crafts on the project were "union" except for the workers employed by Topaz. App. 74, ¶ 45. Topaz has never been a party to any labor agreement with any labor organization. App. 69, ¶ 34.

Soon after Topaz began work on the Claremont project, Larry Ruiz, a business representative of Local 1752, spoke to a construction foreman for Topaz and asked him why Topaz was not signed up with the union. Ruiz stated that the union would have to picket if Topaz did not sign a contract. App. 67, ¶ 28. Since Local 1752 was not the designated bargaining representative for the workers employed by Topaz, it sought to enter into a §8(f) prehire agreement with Topaz.

Following the inquiry by Ruiz, Mike Sullivan, a labor relations consultant for Topaz, arrived at the Claremont jobsite and asked Ruiz what contract Topaz had to sign. Ruiz responded that Topaz had to sign the regular carpenters' contract of the Master Labor Agreement. That contract contained the standard subcontracting clauses set forth above. Sullivan told Ruiz that the proposed contract was illegal but that the contractor would be willing to sign the contract for the Claremont jobsite only. However, Ruiz replied that he could not sign any contract other than the Master Labor Agreement. App. 67, ¶ 29.

In support of the contract demands, Local 1752 and the District Council picketed the Claremont project for a period of 10 days. The placards read as follows:

Topaz Contracting & Dev.
UNFAIR
to
Carpenters
Local 1752
Affiliated with the
Los Angeles Building and Construction Trades Council
No Agreement

App. 68, ¶ 31. At this point, unfair labor practice charges were filed by the contractor.

C. *Proceedings Before the Board*

As shown above, the facts indicated that both Schriver and Topaz employed nonunion carpenters to perform work on construction sites. The facts also revealed that the unions, although not the designated representatives of either contractor's employees, pressured the contractors to agree to the terms and conditions of the Master Labor Agreement. In the case of Schriver, the unions threatened to picket the construction site if Schriver did not sign a current contract. In the case of Topaz, the unions picketed the construction site for 10 days with the object of requiring Topaz to sign the Master Labor Agreement for the first time.

The contracts that the unions sought to have executed by both Schriver and Topaz included broad subcontracting clauses, which prohibited the subcontracting of jobsite work to contractors who were not signatories to current agreements with particular unions having jurisdiction over the work. The agreements also contained provisions permitting the unions to take "any" action if the employer failed to comply with any settlement or decision reached pursuant to the terms of the contractual grievance and arbitration procedure.

In filing unfair labor practice charges against the unions, the contractors contended that the pressure exerted by the unions to secure the agreements was unlawful because the subcontracting clauses contained in those agreements violated §8(e) of the National Labor

Relations Act.[5] The employers asserted two separate grounds upon which they claimed the clauses violated §8(e). First, the employers contended that the subcontracting restrictions were not protected by the construction industry proviso to §8(e) because the clauses were not sought in the context of a collective bargaining relationship as required by the decision in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). Second, the contractors claimed that the clauses were not protected by the proviso because the restrictions were "overbroad."

The clauses were alleged to be overbroad on several grounds. Primarily, the employers argued that subcon-

[5] 29 U.S.C. §158(e)(1976). Section 8(e) provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

tracting agreements in the construction industry may only serve to prohibit the subcontracting of work to nonunion subcontractors at particular jobsites where members of the signatory union are actually employed. Thus, the employers claimed that the subcontracting clauses in the MLA were overbroad because not required to be renegotiated on a jobsite by jobsite basis, or at least limited in application to particular jobsites at which members of the signatory union were present. In addition, the employers argued that the subcontracting clauses were overbroad because they required subcontractors to be signatory to contracts with particular unions.

In a series of companion cases, the Board rejected each of these arguments.[6] The Board held that, standing alone, the subcontracting agreements were protected by the construction industry proviso to §8(e). The Board also held, however, that these otherwise lawful provisions lost the protection of the proviso to §8(e) because of section 306 of Article III of the MLA, which the Board believed authorized the unions to resort to economic action to enforce the subcontracting restrictions.[7] Accordingly, in both the Schriver and Topaz cases, the Board ordered the unions to cease and desist from coercing or restraining the employers where the object thereof is forcing or requiring the employers to enter into subcontracting agreements

[6] In conjunction with the present case, reported at 239 N.L.R.B. 264 (1978), the Board decided the following cases: *Carpenters Local 944 (Woelke & Romero Framing)*, 239 N.L.R.B. 241 (1978); *Colorado Building & Construction Trades Council*, 239 N.L.R.B. 253 (1978); and *Operating Engineers Local 701 (Associated Builders)*, 239 N.L.R.B. 274 (1978). *Woelke & Romero Framing* and *Associated Builders* were reversed in a panel decision of the Ninth Circuit, *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB*, 609 F.2d 1341 (9th Cir. 1979), *rehearing en banc granted*, No. 78-3469 (9th Cir. Aug. 19, 1980).

[7] Two members of the Board dissented from this aspect of the decision. *See* 239 N.L.R.B. 264 at 270, nn.26 & 28.

which are prohibited by §8(e) *by reason of the self-enforcement provisions.*

Two separate appeals are thus consolidated in this court. In No. 78-2177, the employers and various amici seek pursuant to §10(f) of the Act to review the Board decision that the subcontracting clauses themselves to do not violate §8(e).[8] In No. 79-1001, the Board seeks enforce-

[8] Section 10(f), 29 U.S.C. §160(f)(1976), provides in pertinent part that "[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia."

Although the matter has never been raised by any party, we discuss briefly whether the contractors have standing to seek review of the Board's decision and orders. Since the Board orders here were issued against the unions, it could be argued that the employers are not "aggrieved" parties within the meaning of §10(f). However, given the posture of these cases, including the specific findings of the Board on several material issues, we hold that the employers do have standing to seek review of the Board's decision. The Board clearly "den[ied] in whole or in part the relief sought" by the contractors, as set forth in §10(f). The employers may have obtained some relief by virtue of the Board's orders, but it was far from the relief that they sought. The Board's orders simply required the unions to cease and desist from enforcing or attempting to secure agreements that are prohibited by §8(e) *"by reason of self-enforcement provisions." See* 239 N.L.R.B. 264 at 271-72 (emphasis supplied). The Board did not order the unions to cease and desist from attempting to secure the subcontracting restrictions absent self-enforcement measures; the Board specifically ruled that such clauses standing alone were protected by §8(e). Thus, the employers were denied the principal relief that they sought before the Board, and are thus "aggrieved" parties within the meaning of §10(f).

This conclusion is supported by other cases in this circuit. In

ment of its order that the unions cease and desist from attempting to secure the subcontracting clauses in conjunction with self-enforcement provisions. The unions were given leave to intervene in No. 78-2177, and the contractors were given leave to intervene in No. 79-1001.

II. Statutory Framework and the Supreme Court Decision in *Connell*

In a complex case such as the present one, it is helpful at the outset to set forth clearly the governing statutory framework of the National Labor Relations Act. In addition, the applicable provisions of that Act must be considered in light of the Supreme Court decision in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), which has some bearing on the resolution of the issues in this case.

A. *Statutory Framework*

Several provisions of the NLRA bear on this case. Primarily, this case considers the construction of, and relationship between, §8(b)(4), §8(e) and §8(f) of the Act.

Section 8(f) of the Act provides that it shall not be an unfair labor practice for unions and employers in the construction industry to enter into collective agreements (known as "prehire agreements") even though the employ-

Truck Drivers and Helpers Local 728 v. NLRB, 386 F.2d 643 (D.C. Cir. 1967), the Board had found that an employer had violated §8(a)(1) of the Act, but had refused to consider whether §8(a)(3) had also been violated because of the remedy afforded the union by reason of the violation of §8(a)(1). This court nevertheless accepted the union's petition to review the Board order. As stated by the court, "the failure of the Board to grant the additional relief sought renders the Union a 'person aggrieved' by the Board's order within the meaning of §10(f) of the Act, 29 U.S.C. §160(f)." 386 F.2d at 644. *See also Textile Workers Union of America v. NLRB*, 475 F.2d 973, 974 n.2 (D.C. Cir. 1973).

ees of that employer have not designated the union as their lawful bargaining representative.[9] In the case of such a "prehire" agreement, however, the employer or his employees may repudiate the contract at any time.[10] *NLRB v. Local 103, International Association of Bridge, Structural & Ornamental Iron Workers (Iron Workers)*, 434 U.S. 335 (1978). As a result, it has been held that a union may not picket to *enforce* an 8(f) agreement. *Id.*

Unions are also limited in their ability to coerce employers to *enter* 8(f) agreements. If an employer currently employs workers who could vote in a representational election, any recognitional or organizational picketing that exceeds 30 days may be found to violate §8(b)(7) of the Act. *See Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 186 (1978); *NLRB v. Local 542, International Union of Operating Engineers*, 331 F.2d 99 (3d Cir.), *cert. denied*, 379 U.S. 889 (1964). In the present case, the unfair labor practice complaint did not allege a violation of §8(b)(7). Thus, the recognitional picketing of Topaz for 10 days to secure the 8(f) agreement was not found by the Board to violate any proscription of §8(b)(7).[11]

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[9] Section 8(f) is set forth in full at note 4, *supra*.

[10] Under normal "contract-bar" rules, an election petition for representative status may not be filed during the term of a collective bargaining agreement that has a duration of up to three years, or during the first three years of an agreement of longer duration, except during an open period 60-90 days prior to the expiration date of the contract. *General Cable Corp.*, 139 N.L.R.B. 1123 (1962).

[11] The employers in this case have briefly argued that *any* picketing to secure an 8(f) agreement is unlawful. In support of this argument, the employers point to the Supreme Court opinion in *Iron Workers, supra*, where the Court examined the legislative history to §8(f) and concluded, "Congress was careful to make its intention clear that prehire agreements were to be arrived at voluntarily, and no element of coercion was to be ad-

More restrictive provisions on picketing come into play, however, if the agreement sought contains provisions that are prohibited by the Act. Fundamental to this case is the §8(e) ban on so-called "hot cargo" or secondary subcontracting agreements between employers and unions.[12] Although the line between primary and secondary agreements is often difficult to draw, an agreement is generally secondary, and thus prohibited by §8(e), if it requires an employer to boycott the products or services of other parties with an aim of influencing the labor relations policies of those parties.[13] In the present case, the Board held, and

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mitted into the narrow exception being established to the majority principle." 434 U.S. at 348 n.10.

Counsel for the Board in the present case admits that "in enacting Section 8(f) . . . Congress did not intend to authorize minority construction unions to strike, picket, or otherwise coerce employers to sign 8(f) agreements." Appellee's brief, p. 14. However, as the Supreme Court suggests in *Sears, supra*, this can mean no more than that a union may not picket in excess of 30 days without filing a petition for an election under §9(c), as set forth in §8(b)(7)(C). Otherwise, a charge of unlawful picketing to secure an 8(f) agreement would be meaningless. The union would have a complete defense by simply claiming that it intended to file a §9(c) representation petition within 30 days.

We recognize that a question may be raised in the rare instance when a union pickets to secure an 8(f) agreement and, due to the fact that no workers are employed at the time of the picketing, a representational election is not possible. *See NLRB v. Local 542, supra.* We need not and do not consider whether coercion to secure an 8(f) agreement in such a situation violates the Act. In the present case, both Schriver and Topaz employed carpentry workers who were eligible to vote in a representational election. Thus the coercion employed to secure the 8(f) agreements (such as the 10 day picketing of Topaz) did not violate the Act.

[12] Section 8(e) is set forth in full at note 5, *supra.*

[13] For a more complete analysis, *see* R. GORMAN, BASIC TEXT ON LABOR LAW 240-73 (1976).

it is not here contested, that the subcontracting clauses contained in the MLA were secondary in nature and within the general prohibition of §8(e). *See* 239 N.L.R.B. 264 at 267. If an agreement is prohibited by §8(e), §8(b)(4)(A) of the Act prohibits any picketing or threats of picketing aimed at coercing an employer to enter the agreement.[14]

Section 8(e), however, also contains a "construction industry proviso" that permits certain secondary agreements in the construction industry. In particular, the pro-

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[14] Section 8(b)(4) provides, in relevant part, that it shall be an unfair labor practice for a labor organization or its agents:

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization *or to enter into any agreement which is prohibited by subsection (e) of this section*;
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]

29 U.S.C. §158(b)(4)(1976)(emphasis supplied).

viso allows an agreement between a union and an employer engaged in the construction industry "relating to the contracting or subcontracting of work to be done at the site of the construction." 29 U.S.C. §158(e). If an agreement is within the proviso to §8(e), the total ban on picketing to secure the agreement contained in §8(b)(4)(A) is not applicable.[15]

Certain limitations do exist on picketing to obtain a lawful 8(e) agreement. As developed below, the applicable restrictions of §8(b)(7) remain. *Dallas Building and Construction Trades Council v. NLRB*, 396 F.2d 677 (D.C. Cir. 1968). In addition, §8(b)(4)(B)[16] prohibits a union from picketing to *enforce* an 8(e) agreement, or from picketing

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[15] The employers in this case have also argued that picketing to secure *any* 8(e) agreement is unlawful, even if the agreement is within the protection of the construction industry proviso. Courts have repeatedly rejected this argument, for the statute is clear. Section 8(b)(4)(A) only prohibits coercion to secure an agreement "which is prohibited by subsection (e) of this section." 29 U.S.C. §158(b)(4)(A). An agreement protected by the construction industry proviso is not prohibited by §8(e), and thus picketing to secure such an agreement does not violate §8(b)(4)(A). *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Essex County District Council of Carpenters v. NLRB*, 332 F.2d 636, 641 (3d Cir. 1964); *Construction Laborers Local 383 v. NLRB*, 323 F.2d 422, 425 (9th Cir. 1963). As directly stated by this court in *Orange Belt*, *supra*, at 537: "Secondary subcontracting clauses in the construction industry are lawful, under the *proviso* to Section 8(e), and economic force may be used to obtain them notwithstanding Section 8(b)(4)(A), because Section 8(b)(4)(A) incorporates that *proviso* by reference" (footnotes omitted). Coercion used to secure an agreement protected by the construction industry proviso to §8(e) does not violate §8(b)(4)(A). *Cf. NLRB v. Pipefitters Local 638*, 429 U.S. 507 (1977).

[16] Section 8(b)(4)(B) is set forth at note 14, *supra*.

to coerce a neutral contractor from doing business with an already existing and identified nonunion subcontractor. *Orange Belt District Council of Painters No. 48 v. NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964). In the present case, however, *the unfair labor practice complaint did not allege any violation of §8(b)(4)(B).*[17]

The question presented by this case, therefore, is whether the 8(f) agreements sought by the unions violated §8(e). That question turns on whether or not the subcontracting clauses contained in those agreements are within the protection of the construction industry proviso to §8(e). If, but only if, the agreements are *not* protected by that proviso, the picketing and threats of picketing to secure the agreements violated §8(b)(4)(A).

B. *The Supreme Court Decision in* Connell

In *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), the Supreme Court considered at length the construction industry proviso to §8(e). Since certain of the language in *Connell* forms the basis for the employers' contentions here, we are constrained to consider the applicability of the holdings in *Connell* to the instant cases.

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[17] The complaint did not allege that the threats of picketing against Schriver were made in an attempt to *enforce* an 8(f) agreement, or to bring about a cessation of business with any of Schriver's nonunion subcontractors. Similarly, the complaint did not claim that the unions picketed the Claremont project in an attempt to pressure the neutral owner-builder to terminate its subcontract with Topaz. The only charges brought in this case, and the only complaints issued by the Board, allege that the unions unlawfully pressured the contractors to *enter* into subcontracting agreements prohibited by §8(e), and in so doing violated §8(b)(4)(A). *See* App. 5, 7, 14, 15, 23, 25, 32 and 49.

To understand fully the Supreme Court decision in *Connell*, it is essential to view the case in its proper historical context. *Connell* represented another chapter in the struggle between trade unions and general contractors in the construction industry in Dallas, and arose in response to the decision of this court in *Dallas Building and Construction Trades Council v. NLRB*, 396 F.2d 677 (D.C. Cir. 1968). *See Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 483 F.2d 1154, 1157–58 (5th Cir. 1973).

In *Dallas Building and Construction Trades Council*, a trade union council in the Dallas area sought an agreement with a construction employers' association that would restrict subcontracting to employers signatory to agreements with appropriate local craft unions. The trades council was not the authorized bargaining agent of any contractors' employees, and disavowed any intention to become a bargaining representative. Upon the refusal of the employer association to sign the subcontracting agreement, the trades council served a similar demand on four specific contractors. When these contractors also refused to sign the agreement, the trades council picketed several of their jobsites. 396 F.2d at 678–79.

The picketed contractors filed unfair labor practice charges against the trades council. Upon considering the case, the NLRB found that the trades council had violated §8(b)(7) by picketing with a recognitional object at a time when no question of representation could be raised due to contract-bar rules.[18] Both the Board and this court found the council's mere disclaimer of intention to seek recognition to be "unavailing." 396 F.2d at 681. Since the trades council had jurisdiction over employees who would be affected by the subcontracting agreement and sought a con-

[18] The employers' association and several craft unions were already parties to current collective bargaining agreements, many of which had omitted subcontracting clauses. 396 F.2d at 678, 681.

tinuing contractual relationship with their employers, the trades council would necessarily be the "representative" of the employees with respect to the subject matter of the agreement. *Id.* at 638.[19]

The trades council had primarily contended that the subcontracting agreement was protected by the construction industry proviso to §8(e), and that Congress could not have intended to limit so severely picketing to achieve such agreements. This court rejected the council's argument, and held that §8(b)(7) and §8(e) are aimed at wholly different problems. The court held that even though an agreement is lawful under §8(e), and picketing to secure the agreement is not prohibited by §8(b)(4)(A), the picketing may be prohibited by §8(b)(7) if it has an object that is recognitional. 396 F.2d at 682.

In rejecting the council's argument, this court distinguished several cases, relied on by the trades council, that had held that picketing had not violated §8(b)(7) because it was not "recognitional." The court stressed that those cases were "clearly distinguishable" because the labor organizations had sought no contractual ties or continuing relationship with the employers, and because "the subcontracted work was not also performed by the general contractor's own employees." 396 F.2d at 683. The court also noted that the Board had expressly ruled that picketing to secure subcontracting agreements could not violate §8(b)(7) if the coverage of the proposed contract was limited to the type of work that was never performed by the general contractor's own employees. *Id.* at 682 n.8. In these situations, a union by definition could not be deemed to have a recognitional object, since the agreement would not affect any workers the union could represent.

It was in the aftermath of this decision that the events leading to *Connell* occurred. In *Connell*, the union once

[19] The trades council argued unsuccessfully that the subcontracting agreement had only a minor, secondary effect on the signatory contractors' employees. 396 F.2d at 681.

again sought a subcontracting agreement from a Dallas contractor. Upon failing to obtain the agreement, the union picketed and caused a massive walkout on the jobsite. The contractor eventually signed the agreement under protest, and then brought suit in federal court claiming a violation of federal and state antitrust laws. The union defended on the ground that the agreement was authorized by the construction industry proviso to §8(e). *See Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 483 F.2d 1154, 1156-57 (5th Cir. 1973).

In *Connell*, the union sought the subcontracting agreement from an employer who did not employ any workers within the jurisdiction of the union at the time of the demand to contract and the picketing.[20] The sole objective of the union was to enter into an agreement with the contractor by which all work within the union's jurisdiction would be subcontracted to firms who were signatory to a collective bargaining agreement with the union. Since the contractor had no employees within the jurisdiction of the union, the union could not be charged with any recognitional objective. 483 F.2d at 1157.

In this way, the union in *Connell* sought to avoid the reach of *Dallas Building and Construction Trades Council* and §8(b)(7). Since there was no recognitional objective to the picketing, the picketing could not violate §8(b)(7). Since the subcontracting clause appeared to be protected by the construction industry proviso to §8(e), the picketing could not violate §8(b)(4)(A). Thus, the union appeared to have found a means by which it could apply unlimited

[20] The union again disclaimed any interest in recognition, and the agreement expressly provided that the subcontracting limitation applied *only* to work that the contractor did not perform with his own employees and instead uniformly subcontracted to other firms. *See* 483 F.2d at 1156 n.1.

pressure upon contractors to subcontract only with firms who were signatory to agreements with the union. However, the Supreme Court disagreed and ruled that the agreement was subject to federal antitrust laws. The Court thus remanded the case for a determination of whether the agreement restrained trade within the meaning of the Sherman Act. *Id.* at 637.

The Supreme Court recognized in *Connell* that the literal language of the construction industry proviso to §8(e) was broad and that the disputed subcontracting clauses fell within the letter of the statute. The Court added, however, that "§8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment," and proceeded to consider the intention and purpose of the statute. 421 U.S. at 628. The Court noted that "the construction-industry proviso was explained only by bare references to 'the pattern of collective bargaining' in the industry." *Id.* The Court described several policies that may have motivated this special exception contained in §8(e). The decision in *Connell* suggests that one purpose of the enactment of the proviso to §8(e) may have been an attempt by Congress to overrule *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675 (1951), where the Supreme Court had ruled that a labor organization committed an unfair labor practice by picketing a construction site with an object of forcing the general contractor to terminate its contract with a nonunion subcontractor. The decision in *Connell* also recognizes that another purpose of the proviso may have been to allow secondary agreements pertaining to activity on a construction jobsite "because of the close community of interests there," *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 638-39 (1967), or, even more narrowly, "to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site," *Drivers Local 695 v. NLRB*, 361 F.2d 547, 553 (D.C. Cir. 1966). *See* 421 U.S. at

630. The Supreme Court was not called upon to choose between these possibilities, however, because the union conduct in *Connell* was not related to any of the above policies. *Id.* at 631.

Nevertheless, there is one point in *Connell* that is clear. That point is that one of the major aims of the 1959 amendments to the NLRA, of which §8(e) was one, was to limit "top-down" organizing campaigns. *Id.* at 632. The Court noted changes made by Congress in 1959 to limit the ability of a union to utilize such pressure to obtain recognition. *Id.* It was also clear to the Court in *Connell* that this attempt to limit "top-down" organizing would be seriously undermined if the proviso to §8(e) was construed to authorize the subcontracting agreement sought in *Connell*. As described above, if the agreements were indeed protected by the proviso, the union would have an unlimited ability to pressure contractors to deal only with subcontractors who were signatory to agreements with the union, as long as that contractor employed no workers within the union's jurisdiction.

The Supreme Court concluded, therefore, that "absent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on 'top-down' organizing," the construction industry proviso should not be construed to authorize the subcontracting agreement in *Connell*. *Id.* at 633. Instead, the Court concluded that the protection of the proviso to §8(e) "extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common situs relationships on particular jobsites as well." *Id.* Since the union in *Connell* had no interest in representing Connell's employees, the subcontracting agreements were held not to be within the protection of the proviso to §8(e).

III. Sufficiency of a §8(f) Relationship To Satisfy *Connell*

As developed above, the Supreme Court in *Connell* held that the protection of the proviso to §8(e) extends only to subcontracting agreements sought "in the context of collective-bargaining relationships." 421 U.S. at 633. In the present case, the unions were not the designated bargaining representative of a majority of either Schriver's or Topaz' employees and the subcontracting agreements were not sought in the context of a standard §9(a) organizational campaign or collective bargaining relationship. Instead, the agreements were sought as part of a §8(f) prehire agreement between the unions and the employer-contractors. The employers' first argument to this court is that a §8(f) relationship is not sufficient to satisfy the "collective-bargaining relationship" requirement of *Connell*.

The Board in the present case held that the test set forth in *Connell* is satisfied whenever a union seeks a complete contractual relationship with an employer, establishing wages, hours, and other terms and conditions of employment; to satisfy *Connell*, it is irrelevant that the contract is merely a "prehire agreement" authorized by §8(f) and the union lacks established majority status. 239 N.L.R.B. 264 at 268. We fully agree with this conclusion of the Board. Since §8(f) provides the very means by which unions and employers typically initiate a bargaining relationship in the construction industry, we reject the employers' argument that an 8(f) relationship is insufficient to satisfy the collective bargaining requirement of *Connell*.

Fundamentally, it is clear that *Connell* itself does not mandate the employers' position. It must be remembered that in *Connell*, the union expressly disclaimed all recognitional intent and sought a restrictive subcontracting agreement from a contractor whose employees *it could not represent* (a so-called "stranger contractor"). The only

term of the agreement that the union sought in *Connell* was a promise that the employer would subcontract work only to firms signatory to a current collective bargaining agreement with the union. The Supreme Court was thus faced with a situation involving a union that had successfully bypassed the strictures of *Dallas Building and Construction Trades Council* and the reach of §8(b)(7), and had appeared to secure an unlimited weapon by which it could apply organizational pressure on *other* contractors.

The present case bears absolutely no resemblance to *Connell*. Rather than disclaim a recognitional object, the unions in the present case explicitly sought to *secure* representation of Schriver's and Topaz' employees. The unions sought to enter into a complete agreement with the contractors, covering the wages, benefits, and other conditions of employment of the contractors' own employees. Their primary goal was not to apply organizational pressure on *other* firms, but to standardize the working conditions of the employees of these contractors.[21] The unions simply attempted to do so in the context of an 8(f) prehire agreement, the standard means of initiating collective bargaining in the construction industry.[22]

[21] Of course, the subcontracting clauses included within the prehire agreements had certain secondary objectives. Such objectives are made lawful, however, by the construction industry proviso to §8(e). The sole question before us here is whether a prehire agreement, covering the full conditions of employment of a contractor's own employees, is sufficient to satisfy the collective bargaining requirement of *Connell*.

[22] Although clearly not faced with the issue, the Supreme Court suggested in *Connell* that the existence of an 8(f) prehire agreement may be sufficient to satisfy the collective bargaining requirement. In *Connell*, the union argued that the Board had previously authorized subcontracting agreements with "stranger" contractors, citing a case in which the Board had upheld an Administrative Law Judge's conclusion that §8(e) did not prohibit a restrictive subcontracting agreement between a

As a result of this critical factual distinction between *Connell* and the present case, the overriding concern of the Supreme Court in *Connell* is entirely inapplicable here. The Supreme Court holding in *Connell* was based on the fear that the careful limits established by Congress to restrain the ability of unions to organize from the "top-down" would be "undermined seriously" if the proviso to §8(e) was construed to allow unions to seek subcontracting agreements from contractors with which it had no bargaining relationship. 421 U.S. at 633. Since the lack of recognitional intent removed the union in *Connell* from the reach of §8(b)(7), the Court's concern was clearly justified.

That rationale is simply not available in the present case, however. As established by this court in *Dallas Building and Construction Trades Council*, the recognitional object evidenced by the agreement sought in the present case clearly subjects the unions to the stringent limitations of §8(b)(7). The unions do not have an unlimited ability to apply recognitional pressure on other contractors, as the union would have had in *Connell* had the Supreme Court extended the protection of §8(e) to agreements with "stranger" contractors.

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union and a general contractor who used none of his own employees on the particular construction project. *Los Angeles Building & Construction Trades Council*, 214 N.L.R.B. 562 (1974). In rejecting the argument, the Supreme Court noted that in that case, "*[t]he agreement in question may have been a prehire contract under §8(f)*, and it is not clear that the contractor argued that it was invalid for lack of a collective-bargaining relationship." 421 U.S. at 631 n.10 (emphasis supplied). We do not mean to imply that this off-hand statement is a ringing endorsement of the legality of a subcontracting provision contained in an 8(f) agreement, and recognize that this statement could support either argument. The implication is present, however, that the existence of a prehire agreement makes *Los Angeles Building & Construction Trades Council* very different from the situation presented in *Connell*.

The legislative history of §8(f) strongly supports the position that an 8(f) agreement occurs "in the context of collective-bargaining" in the construction industry. Section 8(f) was enacted as part of the 1959 amendments to the National Labor Relations Act. The provision was added due to the peculiar nature of employment in the building and construction industry. As described in the Senate Report concerning §8(f):

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending on various stages of construction.

S. REP. NO. 187, 86th Cong., 1st Sess. 27 (1959), *reprinted in* I LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (LEGISLATIVE HISTORY), at 423 (1959). As a result of these peculiarities, special arrangements became common in the construction industry. As described by the Senate Report:

> In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated.

Id. at 28; I LEGISLATIVE HISTORY at 424. The Report noted that these agreements have special advantages for employers as well as workers:

> One reason for this practice is that it is necessary for the employer to know his labor costs before making the estimate upon which his bid will be based. A second reason is that the employer must be able to have

available a supply of skilled craftsmen ready for quick referral.

Id.[23]

For these reasons and since the practice of signing such agreements was "not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired," *id.*, Congress added §8(f) to the Act. That provision authorizes employers in the construction industry to enter into comprehensive agreements with labor organizations that have not established majority status in the manner provided by §9 of the Act. As the Senate Report bluntly concluded, "[r]epresentation elections in a large segment of the industry *are not feasible* to demonstrate such majority status due to the short periods of actual employment by specific employers." *Id.* at 55; I LEGISLATIVE HISTORY at 451 (emphasis supplied).

Congress thus expressly recognized that §9(a) collective bargaining relationships are often not feasible in the construction industry. Due to the occasional nature of employment in that industry, unions and employers may enter "prehire" agreements that stabilize employment conditions in a particular geographic area over an extended period of time. It would make little sense to conclude that this necessary and most common type of collective bargaining relationship in the construction industry, specifically recognized and authorized by Congress, is not a "collective-bargaining relationship" as that term is used in *Connell*.

There is nothing in the legislative history to suggest that prehire agreements are limited to certain terms and conditions of employment, and may not include others.

[23] For a good description of the advantages of an established labor agreement for employer-contractors, *see* Pierson, *Building Trades Bargaining in Southern California*, 70 MONTHLY LABOR REVIEW 14, at 14 (1950).

The same Congress that adopted §8(f) in 1959 added to the newly enacted §8(e) a proviso that expressly authorizes subcontracting agreements in the construction industry. There is no reason why Congress would *protect* subcontracting agreements in the construction industry under §8(e), and at the same time *prohibit* the most common and possibly the only effective means by which such an agreement may be obtained. We hold, therefore, that a subcontracting agreement sought in the context of an 8(f) prehire agreement does not violate §8(e).

It is true that an 8(f) agreement is not identical in all respects to a standard 9(a) collective bargaining agreement. An 8(f) agreement is not protected by traditional contract-bar rules, and the Supreme Court has recently held that a union violates §8(b)(7) if it engages in extended picketing to enforce a prehire agreement with an employer. *NLRB v. Local 103, International Association of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335 (1978). As also stated by the Supreme Court in *Iron Workers:*

> The employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites.

434 U.S. at 345. The Court further noted an earlier statement of the Board that a "prehire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship." *Id.*; *Rattmann Construction Co.*, 191 N.L.R.B. 701, 702 (1971). These considerations certainly diminish the force and effect of an 8(f) agreement. They are irrelevant to our conclusion, however, that a subcontracting provision sought in the context of an 8(f) prehire agreement occurs "in the context of collective-bargaining" as required by *Connell.*

The requirement in *Connell* that there be a collective bargaining relationship only has meaning within its own context. *Connell* required a collective bargaining relation-

ship to guarantee that a union seeking a subcontracting agreement could not sidestep §8(b)(7) and apply unlimited secondary pressure on nonunion subcontractors. An attempt by a union to establish an 8(f) relationship is sufficient to satisfy that concern; a union seeking an 8(f) agreement covering wages and other terms of employment remains subject to the restrictions of §8(b)(7). *Dallas Building and Construction Trades Council v. NLRB*, 396 F.2d 677 (D.C. Cir. 1968). Whether an 8(f) relationship is otherwise deemed to be a "collective-bargaining relationship" is a question totally academic to this case, missing the entire purpose and thrust of *Connell*.

Even though a prehire agreement is merely a preliminary step towards the development of a full bargaining relationship, Congress recognized in 1959 that it was most often an *indispensable* step. As quoted above from the Senate Report, representative elections leading up to a traditional collective bargaining relationship generally "are not feasible" in the construction industry. Senate Report, *supra*, at 55; I LEGISLATIVE HISTORY at 451. The Supreme Court in *Iron Workers* also recognized the value of a prehire agreement, despite its limited enforcement capability:

> Neither has the Board challenged the voluntary observance of otherwise valid §8(f) contracts, *which is the normal course of events*. It is also undisputed that when the union successfully seeks majority support, the prehire agreement attains the status of a collective-bargaining agreement executed by the employer with a union representing a majority of the employees in the unit.

434 U.S. at 349–50 (emphasis supplied).

Thus, the ability to *enforce* an 8(f) agreement has nothing to do with the *lawfulness* of a subcontracting agreement contained within the 8(f) contract. Indeed, describing 8(f) agreements, the Supreme Court in *Iron Workers* noted that "a comparable situation" exists concerning hot

cargo clauses, "which are *permitted* in the construction industry by §8(e), 29 U.S.C. §158(e), but which cannot be *enforced* by picketing." 434 U.S. at 349 n.11 (emphasis supplied).

It may be that the employers' real complaint in the present case is their belief that §8(b)(7) itself is insufficient to counter "top-down" organizational pressure in the construction industry.[24] It is not for this court, however, to rewrite the careful statutory scheme established by Congress. Due to the applicability of §8(b)(7), the unions in the present case do not have the unlimited right to apply secondary pressure of the sort that triggered the Supreme Court decision in *Connell*. If the present restrictions of §8(b)(7) are inadequate to deal with problems arising during union organizational drives, then further change must come from Congress, not from this court.

The subcontracting agreements in the present case were sought in the context of a collective bargaining relationship. They do not violate §8(e) by reason of their inclusion in an 8(f) prehire agreement.

IV. The Scope of The Construction Industry Proviso to §8(e)

The employers' second major argument on appeal is that the subcontracting agreements sought in the present case

[24] This was suggested during the oral argument before this court when counsel for the employers stated: "As a policy matter, §8(b)(7) is not an effective remedy. The reason it is not an effective remedy is because it isn't just picketing for 30 days. As a practical matter, the union, the way the Board—this is not the question before this court—but the way the Board has interpreted 8(b)(7) the union can picket for 75 and 100 days. . . . So 8(b)(7) does not solve this problem." It is noteworthy that counsel did *not* contend that 8(b)(7) was unavailable to deal with recognitional picketing; rather, he contended that the statutory proscription and remedy were not always effective to serve employer interests.

are beyond the permissible "scope" of the construction industry proviso to §8(e). The parties stipulated that the subcontracting clauses applied "at anytime and any construction jobsite within the definition of the construction proviso to Section 8(e) of the NLRA, as amended, where work within the jurisdiction of Respondents is being performed, regardless of whether or not members of Respondents are present at any given time at any given site." App. 87, ¶ 85.

The employers primarily claim that the agreements are overbroad because the subcontracting clauses need not be renegotiated on a jobsite by jobsite basis after it is determined that workers of the signatory union will be present on that jobsite. Alternatively, the employers argue that the clauses at least should be limited in application to those present and future jobsites where signatory union workers actually will be employed. In addition, the employers claim that the agreements are overbroad because the subcontracting clauses require subcontractors to be signatory to contracts with *particular* labor organizations.

A. *Limitation With Respect to Particular Jobsites*

The employers find support for their principal claim in *Connell*, where the Supreme Court considered briefly the purposes of the construction industry proviso to §8(e). The decision in *Connell* noted that the Supreme Court had previously interpreted the proviso as a measure designed to allow subcontracting agreements "because of the close community of interests" on the construction site, and that other courts had suggested even more narrowly that the purpose of the proviso was "to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." *See* 421 U.S. at 630, and cases cited.

In addition, the employers' argument was recently accepted by a panel of the Ninth Circuit in *Pacific Northwest Chapter of the Associated Builders & Contractors,*

Inc. v. NLRB, 609 F.2d 1341 (9th Cir. 1979), *rehearing en banc granted*, No. 78-3469 (9th Cir. Aug. 19, 1980). In *Pacific Northwest*, the court held that the construction industry proviso extends shelter "only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a nonunion subcontractor." 609 F.2d at 1347. In other words, the Ninth Circuit panel decision would limit the protection of the proviso to subcontracting agreements in which the employer promised not to put signatory union workers and other nonunion workers on the same jobsite. Under such an interpretation of §8(e), an employer could completely circumvent the subcontracting agreement by simply keeping all union workers off the job.

The Board argues that this narrow interpretation of the purpose and scope of the proviso is incorrect and should not be adopted by this court. In particular, the Board argues that the purpose of the construction industry proviso is not limited to insulating signatory union workers from having to work on particular jobsites alongside nonunion workers; the Board also contends that §8(e) protects subcontracting agreements in the construction industry in order to protect continuity of work and benefits for employees, a goal made difficult by the nature of employment in that industry. The Board thus urges that the subcontracting clauses in the present case do not fall outside the scope of the proviso to §8(e).

We believe that the interpretation of the Board is consistent with the intent of Congress in enacting the construction industry proviso to §8(e). Accordingly, we refuse to adopt the narrow interpretation of the proviso adopted by the panel decision of the Ninth Circuit in *Pacific Northwest*.

At the outset, we note that *the proviso itself to §8(e) contains no limitation such as that proposed by the employers in this case.* Instead, the proviso broadly au-

thorizes agreements in the construction industry "relating to the contracting or subcontracting of work to be done at the site of the construction," §8(e), 29 U.S.C. §158(e). The agreements in the present case thus plainly fall within the literal protection of the statute. We recognize, however, as the Supreme Court stated in *Connell*, that "§8(e) must be interpreted in light of the statutory setting and the circumstances surrounding its enactment." 421 U.S. at 628. We would emphasize, however, that the Supreme Court in *Connell* did not dispose of the issue before us. The Court in *Connell* was faced solely with the question whether a subcontracting agreement could be sought outside the context of a collective bargaining relationship. The Court did not consider the *scope* of the construction industry proviso to §8(e), the precise question now before us. As recognized by the panel decision in *Pacific Northwest*:

> However, since the subcontractor agreement in *Connell* occurred outside the collective bargaining context altogether, the Court was not required to decide whether and under what circumstances a subcontractor clause contained in a valid labor agreement would receive the protection of the proviso. What *Connell* left unanswered we must confront and answer.

579 F.2d at 1348.[25]

We turn then to consider the "statutory setting and the circumstances surrounding" the enactment of §8(e). Before examining the legislative history in detail, however, it will be useful to mention briefly the legislative and case law

[25] The Supreme Court also did not determine the purpose behind the construction industry proviso. Although noting that the proviso may have been enacted because of the close community of interests on the jobsite, or even simply to alleviate the frictions that arise when union and nonunion workers are employed together, the Court did not decide the question since the union in *Connell* did not suggest that its subcontracting agreement related to any of those policies. 421 U.S. at 630-31.

history preceding the passage of §8(e). Certain "secondary" activity was forbidden prior to the 1959 amendments to the Act. In particular, §8(b)(4)(A) of the Act prohibited a union from inducing employees to strike or to refuse to handle goods when an object of such activity was to force an employer to cease doing business with some third party. In the *Sand Door* case, *Local 1976, United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958), however, the Supreme Court stated that a boycott *voluntarily* engaged in by an employer did not violate the Act, and that a union could approach an employer to persuade him to engage in such a boycott as long as it refrained from prohibited concerted activity. 357 U.S. at 98-99.[26]

In 1959, Congress moved to close this "loophole" and prohibit such "hot cargo" agreements themselves. *See Mullins v. Kaiser Steel Corp.*, No. 79-1463, slip op. at 20 (D.C. Cir. Sept. 17, 1980); *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 634 (1967). The Senate version of §8(e) merely would have made it an unfair labor practice for an employer in the trucking industry to agree to boycott the products of any other employer. *See* H.R. REP. NO. 1147, 86th Cong., 1st Sess. (Conference Report) 39 (1959); I LEGISLATIVE HISTORY at 943. The House amended the bill to make it an unfair labor practice for *any* labor organization and *any* employer to enter into such an agreement. *Id.* The conference committee adopted the House amendment, but added three provisos, one of which is the construction industry proviso at issue in this case. *Id.*

The Conference Report briefly describes the purpose of the construction industry proviso to §8(e). After stressing

[26] A secondary agreement voluntarily entered into could be "enforced" through the grievance procedure, by judicial action, or by promises of a "tougher than usual" stance of the union at the next contract negotiation or grievance adjustment. *See* R. GORMAN, BASIC TEXT ON LABOR LAW 262 (1976).

that the proviso extends only to work to be performed at the site of the construction, the Report states:

> The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case *(Local 1796* [sic], *United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958)). To the extent that such agreements are legal today under section 8(b)(4) of the National Labor Relations Act, as amended, *the proviso would prevent such legality from being affected by section 8(e).*

Conference Report at 39; I LEGISLATIVE HISTORY at 943 (emphasis supplied).

Similar remarks were made during subsequent Congressional debate. As Senator John F. Kennedy, chairman of the joint conference, stated on the Senate floor:

> The Landrum-Griffin bill extended the "hot-cargo" provisions of the Senate bill, which we applied only to Teamsters, to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern. The Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project. *Both changes were necessary to avoid serious damage to the pattern of collective bargaining in these industries.*

105 CONG. REC. 17899 (1959); II LEGISLATIVE HISTORY at 1432 (emphasis supplied). *See also* remarks of Representative Thompson on the House floor, 105 CONG. REC. 18134 (1959); II LEGISLATIVE HISTORY at 1721.

From an examination of the legislative history, therefore, one point alone is clear: the construction industry

proviso to §8(e) was intended to preserve the pattern of collective bargaining in the construction industry as it existed prior to 1959 and the enactment of §8(e). As indeed recognized by the Supreme Court in *Connell:*

> Although the garment-industry proviso was supported by detailed explanations in both Houses, the construction-industry proviso was explained only by bare references to "the pattern of collective bargaining" in the industry.

421 U.S. at 628–29 (footnotes omitted).

Unfortunately, as suggested by the Court in *Connell*, the legislative history does not spell out exactly what "the pattern of collective bargaining" in the industry was prior to 1959, or precisely what serious damage would be afflicted should that pattern be changed. Remarks by Senator Kennedy, however, make clear that Congress believed that subcontracting agreements were lawful in the construction industry prior to 1959:

> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them.

105 CONG. REC. at 17900; II LEGISLATIVE HISTORY at 1433.

The employers in this action have not cited a single case in which a subcontracting agreement was found to be unlawful prior to 1959 by reason of the fact that the agreement was not limited to particular jobsites at which signatory union workers were employed. There is absolutely no evidence that such agreements were prohibited prior to 1959, and the legislative history makes clear that if an agreement was lawful in 1959, the construction industry

proviso "would prevent such legality from being affected by section 8(e)." Conference Report, *supra*, at 39; 1 LEGISLATIVE HISTORY at 943.

On the other hand, there is evidence that the pattern of collective bargaining in the construction industry in 1959 included subcontracting agreements such as those present in this case. Perhaps most influential is a report published in 1961, containing the results of a study which examined "the prevalence and characteristics of subcontracting provisions in major collective bargaining agreements in effect in 1959, prior to the Taft-Hartley amendments contained in the Labor-Management Reporting and Disclosure Act of 1959." Lunden, *Subcontracting Clauses in Major Contracts*, 84 MONTHLY LABOR REVIEW 579 (part I), 715 (part II), at 579 (1961).[27]

After describing the prevalence of subcontracting agreements in the construction industry, the study noted:

> The single most frequent requirement, found in more than 50 major contracts, called for the subcontractor to comply with all the terms and conditions of the prime employer's agreement. This provision "blankets in" the subcontractor, no matter what project he works on in the local union's jurisdiction or which prime employer he works for.

Id. at 715. Although the report surveys and describes every type of subcontracting agreement used in a major collective bargaining agreement in the construction industry at that time, *not one agreement was found to limit the applicability of the subcontracting restriction to particular jobsites at which both union and nonunion workers were employed.* *Id.* at 715–16.

[27] The Bureau of Labor Statistics compiled 1,687 major collective bargaining agreements covering 1,000 or more workers each, or "virtually all agreements of this size in the United States exclusive of those in the railroad and airline industries." *Id.* at 581.

In keeping with this fact, the Board has consistently held in cases decided since 1959 that subcontracting agreements need not be limited to particular jobsites. After surveying a series of cases involving subcontracting agreements such as those at issue in this case, the Board in *Carpenters Local 944 (Woelke & Romero Framing)*, 239 N.L.R.B. 241 (1978) concluded:[28]

> Thus, the Board has upheld clauses, such as those herein, which are not limited to particular existing jobsites or to the duration of particular jobs.

239 N.L.R.B. at 248. The Board further noted that:

> As can be seen from the foregoing cases, as well as others too numerous to cite, the Board, with court approval, has construed the construction industry proviso literally to protect "any agreement" between qualified parties which limits subcontracting of work to be performed at the site of construction to employers who are signatory to a specific union agreement or to an agreement generally with the "appropriate union" (meaning, generally, an affiliate of a building and construction trades council).

Id.

There are reasons why subcontracting agreements in the construction industry—prior to 1959 as well as today—have not been limited to particular, identified jobsites. As stated in the Lunden study on subcontracting agreements in existence in 1959, *supra*:

> In the construction industry, subcontracting is generally accepted by unions and employers as a normal condition of work. Few provisions were found that attempted to preserve job opportunities by creating certain conditions under which management could contract out. For example, only one clause prohibited subcontracting if it would result in layoff, and a very

[28] *Woelke & Romero Framing* was reversed by a panel of the Ninth Circuit in *Pacific Northwest*, *supra*, *rehearing en banc granted*, No. 78-3469 (9th Cir. Aug. 19, 1980).

small number required the company to notify the union in advance of subcontracting or to subcontract only after receiving union approval. On the other hand, *the protection of contract standards was of major interest.* The most common restrictions required the subcontractor to comply with the terms of the prime employer's contract, to have a union agreement of his own, or to employ union labor and use union-made material.

84 MONTHLY LABOR REVIEW at 715 (emphasis supplied).

In other words, the purpose of subcontracting provisions in the construction industry is not simply to avoid "friction" on the jobsite that may arise when both union and nonunion workers are present. A fundamental purpose of subcontracting agreements is, and always has been, to protect contract standards in the construction industry, a goal that would be unattainable in that industry if subcontracting agreements were not allowed.

Understanding the special nature of employment in the construction industry is critical to understanding the special purpose of subcontracting agreements in that industry. Due to the infeasibility of negotiation on a project by project basis, "master" or "prehire" agreements are negotiated with an employer in the construction industry, establishing uniform conditions of employment over an extended period of time and geographic area. Special fringe benefit funds are created. Standing alone, however, such agreements are incapable of protecting the conditions they establish, as a result of an additional facet of employment in the construction industry.

In the construction industry, subcontracting is the usual rather than the extraordinary practice. Workers are not typically attached to one employer; rather, workers are organized in employment pools to be hired out either by the contractor with whom they have an agreement or by a subcontractor to whom the work is assigned. The only way

that workers in the employment pool may be certain to receive the protection and benefits provided by the master collective bargaining agreement is if subcontracting is limited to subcontractors who are signatory to that agreement, or who provide identical terms.

In other words, in most cases it makes little difference to construction workers whether they are employed directly by the contractor with whom they have an agreement or by an assigned subcontractor, as long as the standards of their original employment contract are protected. The fulfillment of that goal is guaranteed by subcontracting agreements such as those at issue here. Thus, the freedom of the contractor signatory to the agreement to either perform work directly or subcontract out is preserved, while at the same time workers are guaranteed that contract standards will be protected in either event.

Employees working under a collective bargaining agreement on a construction site have an interest in not being replaced through subcontracting by other workers willing to do the same work without the same compensation or benefits. The special nature of the construction industry, however, forces that interest to be expressed in a special manner. Since their employment will be terminated in any event once a given project is completed, the concern of these employees is not simply that they will be replaced at the particular location at which they are working with nonunion workers. As a result of the temporary and transitory nature of employment in the construction industry, workers are more concerned that the union-represented pool of workers to which they belong will be "replaced" at future projects. Since the employee pool is not attached to a particular employer but to the industry as a whole, workers in the construction industry have no interest in forbidding "contracting-out" altogether, as do their counterparts in the industrial sector. Instead, their interest is in assuring that their collective bargaining agreement is respected on each jobsite upon which their

employer works whether he does the work himself or subcontracts it out.

It is evident, therefore, that to require subcontracting agreements to be renegotiated on a jobsite by jobsite basis, or limited in application to jobsites where union workers are already present, would completely subvert a primary purpose of subcontracting agreements in the construction industry. This is an extremely important consideration here because, as noted above, the construction industry proviso to §8(e) was intended to embrace lawful practices in effect in the industry as of 1959.

Moreover, it is simply not feasible for employers and unions in the construction industry to renegotiate agreements on each jobsite, a fact recognized by Congress in enacting §8(f) in 1959. To repeat the words of the Senate Report, labor agreements in the construction industry "necessarily apply to jobs which have not been started and may not even be contemplated." Senate Report, *supra*, at 28; I LEGISLATIVE HISTORY at 424. The position urged upon us by the employers would force unions and employers to negotiate subcontracting agreements on a jobsite by jobsite basis, despite the fact that §8(f) authorizes collective bargaining agreements in the construction industry without limitation with respect to the employer's current and future jobsites in the area covered by the union's jurisdiction. We believe it to be inconceivable that the same Congress that enacted §8(f) to accommodate the special characteristics of the construction industry ignored those very same characteristics in enacting the construction industry proviso to §8(e). Certainly nothing in the legislative history to those sections suggests such a result.

Accordingly, we hold that the subcontracting agreements in the present case did not violate §8(e) by reason of the fact that the clauses did not need to be renegotiated on each individual jobsite, or because the clauses were not

limited to particular jobsites at which signatory union workers were already employed.[29]

This holding is not contrary to *Connell*. It is true that it would have been even easier to standardize employment conditions in the construction industry had the Supreme Court in *Connell* held that subcontracting agreements could be sought outside the context of collective bargaining. The fact that the Supreme Court rejected that outcome, however, does not mandate a similar resolution here.

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[29] We note that there is a remote, hypothetical situation in which the employers' argument could come into play. Conceivably, a general contractor could be engaged at a future jobsite where he did not use *any* carpenters, union or nonunion. If a prehire agreement with a carpenters union required that he subcontract work on *that* jobsite to union plumbers and union electricians, that agreement might arguably be beyond the scope of the proviso to §8(e). Since no carpenters are employed on the jobsite, there can be no interest in maintaining contract standards for carpentry workers. Similarly, since no carpenters are ever on the jobsite, there can be no friction between union carpenters and other nonunion workers.

This hypothetical situation is not presented here, however. Certainly on all jobsites involved in this case, the employers used carpentry workers. More importantly, we do not believe that the subcontracting agreements at issue would themselves restrict subcontracting in the above hypothetical situation. As stipulated by the parties, the subcontracting agreements apply "at anytime and any construction jobsite within the definition of the construction proviso to Section 8(e) of the NLRA, as amended, *where work within the jurisdiction of Respondents is being performed*, regardless of whether or not members of Respondents are present at any given time at any given site." App. 87, ¶ 85. In the above hypothetical situation, it would appear that work within the jurisdiction of the union was not being performed. In any event, since the situation is not presented by the facts of this case and has not been addressed by the parties, we leave its resolution to another day.

As developed above, the subcontracting agreements in the present case are consistent with the pattern of collective bargaining in the construction industry existing at the time of the 1959 amendments to the NLRA. In contrast, the subcontracting agreement sought in *Connell* was "a relatively novel organizing tactic in the building trades." St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 628 (1976). In his dissent from the Fifth Circuit's opinion in *Connell*, Judge Clark noted that the union in *Connell* had been unable, in response to a specific request for supplemental briefs, "to point out any source of information which would show that subcontractor contracts such as the one in this case were even occasionally utilized in the industry prior to 1959, much less so common a practice that we could assume Congress intended to preserve that part of the pattern of collective bargaining in the industry." 483 F.2d at 1182.

In addition to the lack of evidence showing that the subcontracting provision in *Connell* was consistent with the pattern of bargaining in the industry, the Supreme Court in *Connell* was also faced with a union tactic that effectively avoided certain of the clear proscriptions of §8(b)(4) and §8(b)(7). Thus, the Court in *Connell* did not feel bound by the literal language of §8(e) and, instead, imposed a limitation not expressly included in the statute in order to enforce a clear congressional mandate to restrict "top-down" organizing. 421 U.S. at 628, 633.

In the present case, the "glaring loophole" found in *Connell* does not exist; no congressional purpose is undermined by the union conduct at issue. Instead, the agreements sought are fully consistent with the declared legislative purpose of maintaining the pattern of collective bargaining as it existed in the construction industry prior to 1959. In such a situation, we believe that it is not the province of this court to ignore the literal wording of the statute and impose a significant limitation that is not ex-

pressly included in the statute. Any further modification of the statute must come from Congress.

For all of these reasons, we refuse to follow the holding of the panel of the Ninth Circuit in *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB*, 609 F.2d 1341 (9th Cir. 1979), *rehearing en banc granted*, No. 78-3469 (9th Cir. Aug. 19, 1980). We believe that the panel decision has misinterpreted the legislative history and has too narrowly construed the purpose behind the construction industry proviso to §8(e).[30]

[30] Without repeating the analysis presented above, we respectfully disagree with the panel opinion of the Ninth Circuit on several points. The court reached its conclusion through a series of steps. First, the court concluded that the *Sand Door* case, 357 U.S. 93, did not conclusively establish the legality and scope of subcontracting agreements prior to 1959. 609 F.2d at 1348-49. Second, the Ninth Circuit concluded that it is not entirely clear that the construction industry proviso was intended to preserve the existing state of the law in the industry, since the proviso added a limitation of "jobsite work" that did not exist prior to 1959. *Id.* at 1349. Finally, finding the legislative history to be inconclusive, the court considered the purpose of the proviso and concluded that the sole purpose was to avoid union-nonunion jobsite friction. *Id.* at 1349-50. Accordingly, the court limited the permissible scope of the proviso to union-nonunion conflicts on the jobsite.

We believe that the court has misapplied the legislative history of §8(e). Regardless of whether or not *Sand Door* conclusively resolved the legality of subcontracting agreements, no court had ever held such agreements to be unlawful prior to 1959, or had in any way narrowed their scope. As developed above, we believe that Congress perceived in 1959 that decisions of the Board and the courts had created "loopholes" by which secondary agreements voluntarily entered were lawful, and enacted §8(e) to change that result outside the construction and apparel industries. As stated in *Brown v. General Services Administration*, 425 U.S. 820, 828 (1976), "the relevant inquiry is not whether Congress correctly perceived the then state of

B. *The Relevance of Physical Presence at the Jobsite*

There is an additional and more refined argument of the employers in this case that must also be addressed. We have concluded that subcontracting agreements exist in the construction industry for at least two separate reasons. First, subcontracting agreements are allowed so that unions may protect established contract standards against the threat posed by the prevalence of subcontracting and the short term nature of employment in the construction industry. Second, once union workers are employed on a jobsite, subcontracting agreements are allowed so that those workers will not be forced to work alongside nonunion workers on the same jobsite.

The employers in this case have focused most of their attention on the first of these major concerns. The employers also have argued, however, that subcontracting agreements should not be allowed to extend beyond the time when signatory union workers are *physically* present on the jobsite. In other words, the argument runs, even

the law, but rather what its perception of the state of the law was."

In addition, to us it is beyond dispute that Congress intended to leave the current state of the construction industry unchanged, concerning the subcontracting of work to be done at the jobsite. The fact that Congress limited the proviso to jobsite work does not in any way affect the legality or scope of subcontracting agreements that do in fact concern work completed at the jobsite.

Most importantly, we believe that the Ninth Circuit panel decision defined the purpose of the construction industry proviso to §8(e) too narrowly. Although the elimination of jobsite friction is indeed a legitimate concern, we believe that subcontracting agreements existed and continue to exist in the construction industry as a means of protecting contract standards, a goal made difficult as a result of the prevalence of subcontracting in that industry and the temporary and transitory nature of employment.

though the signatory union is utilized on the jobsite, thus satisfying the first major concern above, there are times when subcontracted work is performed and the signatory craft is not simultaneously working on the jobsite and, thus, at such times, the second major concern above is not applicable.

We decline to accept this argument in the present case. We believe that to do so would be overly formalistic and once again ignore the realities of employment situations on a construction jobsite.

It is firmly established, and not here contested, that at the very least, subcontracting agreements are allowed in the construction industry because of the "close community of interests" existing on a construction site and "the frictions that may arise" when union workers are employed along with nonunion workers on the same project. *See Connell, supra*, 421 U.S. at 630. We do not believe these statements to mean, however, that problems arise solely when union workers are forced to work "elbow-to-elbow" with other nonunion workers.

More realistically, "friction" may arise when two sets of workers are employed on a common construction site under substantially different employment conditions. It is true that, nominally, different crafts on the project are likely to have separate employers. While the Supreme Court established, in *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951), that these employers on a common jobsite remain separate and distinct, Congress recognized in §8(e) that there is a very special relationship between them. The entire thrust of the proviso to §8(e) is that craft work on a construction site cannot be treated as isolated and removed from other craft work.

There is simply nothing in the legislative history of the proviso to §8(e), or in practices in the construction industry prior to 1959, to suggest the limitation urged by the employers here. Accordingly, we affirm the position of the

Board and hold that subcontracting agreements need not be so limited. In doing so, however, we wish to emphasize that it is impossible for this court to anticipate every possible variation that may arise concerning subcontracting arrangements on a construction jobsite. There may be situations where the relationship between craft work on a jobsite is so remote, so removed in time of performance, that one craft would have no interest in how work is performed by another craft. While we do not believe the subcontracting agreements in the present case to be beyond the scope of the proviso to §8(e), we leave the final limits of the protection afforded by the proviso to be decided in future cases, where specific factual events will illuminate problems and issues in a manner much clearer than that presented by the very general facts of this case.

C. *The Legality of Union-Specific Clauses*

Finally, the employers argue, in a somewhat cursory fashion, that the subcontracting agreements at issue here are beyond the scope of the proviso to §8(e) because the agreements permit subcontracting only with particular unions affiliated with the Trades Council.

The Supreme Court in *Connell* noted that the subcontracting agreement at issue in that case prohibited subcontracting to any firm that did not have an agreement with the specific union local, giving the union "complete control over subcontract work offered by general contractors that had signed [the subcontracting] agreements." 421 U.S. at 624. The Court went on to state:

> Such control could result in significant adverse effects on the market and on consumers—effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions.

Id. Since the Court held that the subcontracting agreements in *Connell* were not protected by the proviso to §8(e) because not sought in the context of a collective bargaining relationship, the Court did not resolve whether

union-specific subcontracting agreements are outside the scope of the proviso.

Neither the employers nor the amici point to any case that has accepted this limitation on the proviso. The Board in fact has consistently upheld the validity of union-specific agreements. As recognized by the Board in *Woelke & Romero Framing*, *supra*, 239 N.L.R.B. 241 (1978):

> Since the enactment of the 1959 amendments to the Act, the Board and courts have consistently upheld contract provisions between employers and unions in the construction industry which permit the employer to subcontract work to be performed at the site of the construction only to subcontractors who are signatory to contracts either with a particular union or with unions having jurisdiction over the type of work involved.

Id. at 247.[31] Although the panel of the Ninth Circuit in *Pacific Northwest*, *supra*, reversed much of *Woelke & Romero Framing* and placed other severe restrictions on the scope of the construction industry proviso, the panel opinion nevertheless explicitly refused to limit the proviso to §8(e) to subcontracting agreements that are not "particular union" agreements. *See* 609 F.2d at 1350 n.8.

We agree with the view that union-specific subcontracting agreements are within the scope of the construction industry proviso to §8(e). Although we are not called upon to weigh "the union's legitimate goals of organizing workers and standardizing working conditions" against any "significant adverse effects on the market and on consumers," we believe that in this case these legitimate union goals are in fact sufficient to justify union-specific agreements. We once again note that there is nothing in the literal wording of the statute suggesting the limitation that the employers here seek. Nor is there any overriding

[31] *See also Carpenters Local 15*, 240 N.L.R.B. No. 52 (Jan. 25, 1979).

congressional purpose that would be undermined if §8(e) is construed to permit union-specific agreements, such as that which caused the Supreme Court to avoid the literal language of the Act in *Connell*.

Instead, we believe that the legislative history supports the proposition that subcontracting agreements in the construction industry may be union-specific. As fully developed above, the principal concern of Congress in enacting the construction industry proviso was to preserve the pattern and practice of bargaining in the construction industry. There is evidence that nearly all subcontracting agreements in existence in the construction industry in 1959 were in fact union-specific agreements.

As described above, a comprehensive study was conducted of subcontracting agreements in existence at the time of the 1959 amendments to the NLRA. Lunden, *Subcontracting Agreements in Major Contracts*, 84 MONTHLY LABOR REVIEW 579 (part I), 715 (part II) (1961). That study included a survey of major contracts in the construction industry, 83 of which contained subcontracting agreements.

The findings of the survey are again relevant here. As stated by the study:

> The single most frequent requirement, found in more than 50 major contracts, called for the subcontractor to comply with all the terms and conditions of the prime employer's agreement.

Id. at 715. In *Local 437, IBEW*, 180 N.L.R.B. 420 (1969), the Board specifically established that such clauses permit subcontracting only to employers who have recognized the signatory union, since the phrase "complying with the terms of this agreement" covers union recognition as well as all other terms. 180 N.L.R.B. at 420. *Accord, Building and Construction Trades Council v. NLRB*, 328 F.2d 540 (D.C. Cir. 1964).

The study also noted:

> Closely allied to this approach was a second large

group of construction industry contracts which required the subcontractor to be under agreement with the same local, with another local of the same international union, with a recognized building trades union, or with an AFL-CIO affiliate.

84 MONTHLY LABOR REVIEW at 716. Union-specific subcontracting agreements were clearly common in the construction industry at the time of the enactment of §8(e).

We also believe that union-specific subcontracting agreements are consistent with the purposes of §8(e). As fully developed above, the purpose of the construction industry proviso to §8(e) is not simply to permit a union on a jobsite to ensure that only "union" workers are present on the site, and thus avoid union-nonunion "friction."[32] It is through subcontracting agreements that a union may protect established contract standards in the construction industry. It is through subcontracting agreements that a union may guarantee payments to particular established pension funds. We believe that restricting the protection of the proviso to §8(e) to "generic" union subcontractors is inconsistent with these legitimate union goals. Absent some compelling reason such as that present in *Connell*, we refuse to ignore the literal wording of the statute and adopt such a restriction.[33]

[32] As recognized by the ALJ in *Carpenters Local 15*, 240 N.L.R.B. No. 52 at 16 (Jan. 25, 1979): "To construe the proviso as authorizing only such agreements as limit subcontracting to unionized companies would also make a mockery of the protection afforded thereby, for it could be circumvented by any group of employees which chose to style themselves 'union.'"

Even if avoiding "friction" on the jobsite was the sole consideration, there is no guarantee that there is less friction on a jobsite when members of competing unions are forced to work alongside each other, than when union and nonunion workers are employed on the same jobsite. *See Pacific Northwest*, *supra*, at 1350 n.8; *Carpenters Local 15*, *supra*, at 16 n.17.

[33] We recognize that one implication of this holding is that a

D. *Deference to the Board*

For all of the reasons presented above, we believe that the Board's interpretation of the scope of the construction industry proviso to §8(e) is entirely consistent with the legislative history of that section and the purposes for which it was enacted. In closing, we note that in matters of statutory construction, we are bound to give considerable deference to the interpretation of the statute by the Board. *NLRB v. Broadcast Employees and Technicians Local 31*, No. 78-2045, slip op. at 11 (D.C. Cir. July 23, 1980). As stated by the Supreme Court in *Iron Workers*:

> Courts may prefer a different application of the relevant sections, but "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB v. Truck Drivers*, 353 U.S. 87, 96 (1957); *NLRB v. Insurance Agents*, 361 U.S. 477, 499 (1960).

434 U.S. 335 at 350 (1978). We certainly cannot say, as was said in *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965), that the position taken by the Board is "fundamentally inconsistent with the structure of the Act and the function of the sections relied upon."

subcontractor signatory to a contract with a competing union may be frozen out of work with a contractor who signs a union-specific subcontracting agreement with another union. Certainly this consideration must be balanced against the concerns expressed above. In doing so, however, we were influenced by a finding of an ALJ that was affirmed by the Board in *Carpenters Local 15, supra*. In upholding union-specific subcontracting agreements and rejecting this problem, the ALJ noted: "[T]he problem is more theoretical than real. Except for some slight overlapping of functions here and there, there is usually only a single union that represents each particular craft in the construction industry." *Id.* at 17. There is nothing in the record of this case to suggest otherwise.

In summary, we hold that the subcontracting agreements in the present case are within the scope of the construction industry proviso to §8(e). Accordingly, the pressure exerted to secure the agreements did not violate §8(b)(4)(A).

V. The Self-Enforcement Feature of The Agreements

One final issue remains. Although the Board did not find that the subcontracting agreements violated §8(e) for any of the reasons discussed above, the Board did conclude that the agreements lost the protection of §8(e) by reason of the fact that section 306 of the Master Labor Agreement authorized the unions to take "any" action to enforce "any" settlement or decision obtained in the grievance and arbitration procedure.[34] The Board found that this provision of the contract authorized economic action by the unions to enforce the subcontracting restrictions. 239 N.L.R.B. 264, at 270-71.[35] Since subcontracting agreements may not be *enforced* through economic action, the Board ordered the unions to cease and desist from pressuring the contractors to enter into an agreement that is prohibited by §8(e) by reason of self-enforcement provisions. *Id.* at 271-72.

The unions here argue that the contract does not authorize self-help measures to enforce the subcontracting agreements. Moreover, the unions contend that there has been no showing of an intent at any time to use the "self-help" provision to justify economic action to enforce the subcontracting agreements, and that the Board should not engage in "speculation" that the provision will be utilized

[34] Section 306 of the Master Labor Agreement is set forth in full, in the text of the opinion in part I.A.

[35] Two members of the Board dissented from this aspect of the Board's decision. 239 N.L.R.B. 264, at 270 nn.26 & 28.

in an unlawful manner. Accordingly, the unions request that the cease and desist order be vacated by this court.[36]

We reject the argument advanced by the unions and enforce the order of the Board. As all parties indeed admit, subcontracting agreements lose the protection of the construction industry proviso if they contain terms that sanction employee strikes or other self-help measures to enforce the agreement. *Bricklayers Local 2 v. NLRB*, 562 F.2d 775, 787-88 (D.C. Cir. 1977). Section 306 of the Master Labor Agreement applies to *any* settlement or decision of the grievance-arbitration process, and thus would appear to include a decision concerning the subcontracting agreements within its coverage. We do not believe that the unions' mere disclaimer of intent to utilize that provision to enforce the subcontracting agreements is sufficient to cure this defect in the contract.[37]

As a result, we agree that the subcontracting agreements in the present case are not protected by the construction industry proviso to §8(e). For the reason ad-

[36] The unions do not urge this position very strongly. At oral argument, one union counsel conceded this "self-help" aspect of the case was touched in the brief "in a very minor, minor way," and that the unions "are quite content with the Board order." Counsel also noted in oral argument that the contract has already been amended to clarify the problem and now expressly prohibits the use of economic action to enforce the subcontracting agreements.

[37] We note that a similar problem concerning a different aspect of the construction industry proviso was presented to the Ninth Circuit in *Operating Engineers Local 701 v. NLRB*, 578 F.2d 841 (9th Cir. 1978). As resolved by that court: "In the Union's view, while the clause states that it covers work performed 'at or near' the jobsite, the clause has actually been interpreted to mean 'on' the jobsite, and as so interpreted, the clause falls within the proviso. We find this argument unpersuasive. The clause must be considered to mean what it says." *Id.* at 842.

vanced by the Board, we order the unions to comply with all aspects of the Board's order.

VI. Conclusion

In No. 78-2177, we dismiss the petition of Donald Schriver, Inc., Sullivan-Kelley & Associates, Topaz Contracting & Development Company, Inc., and Sullivan and Associates to review and modify the decision of the National Labor Relations Board reported at 239 N.L.R.B. 264 (1978). In No. 79-1001, we enforce the order of the Board issued against Local 1497, United Brotherhood of Carpenters and Joiners of America; Local 1752, United Brotherhood of Carpenters and Joiners of America; the Los Angeles Building and Construction Trades Council; and the Los Angeles County District Council of Carpenters in that same proceeding.

So ordered.

Appendix B

DECISION AND ORDER

Upon appropriate charges[1] duly served on Respondents, the General Counsel of the National Labor Relations Board, acting through the Regional Director for Region 21, on January 11, 1977, issued complaint and notice of hearing in the cases involving Schriver, alleging that Respondent Trades Council and Respondent Local 1497 had violated Section 8(e) and Section 8(b)(4)(ii)(A) of the Act, and on March 23, 1978, issued complaint and notice of hearing in the case involving Topaz, alleging that Respondent District Council and Respondent Local 1752 had violated Section 8(b)(4)(i) and (ii)(A) of the Act. Respondents filed answers

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[1]The charges in Cases 21-CC-1680 and 21-CE-144, involving the employer Donald Schriver, Inc. (herein Schriver), were filed by Sullivan-Kelley & Associates (herein Charging Party), against Los Angeles Building and Construction Trades Council (herein Respondent Trades Council) and Local Union No. 1497, United Brotherhood of Carpenters and Joiners of America (herein Respondent Local 1497). The original and amended charges involving the employer

denying the commission of any unfair labor practices. Thereafter, General Counsel consolidated the cases involving Schriver and Topaz, and on July 6, 1977, issued an amended consolidated complaint and amended notice of hearing in the cases, alleging the same unfair labor practices covered in the earlier separate complaints.

On August 30 and 31, 1977, the parties in the cases, for the purpose of this proceeding only, entered into a stipulation of facts, including extensive exhibits, and a motion to transfer the proceedings to the Board for findings of fact, conclusions of law, and Order directly by the Board.[2] On November 4, 1977, the Board accepted the

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Topaz Contracting & Development Co., Inc. (herein Topaz), were filed by Sullivan and Associates (herein Charging Party) on March 9 and 15, 1977, against Los Angeles County District Council of Carpenters (herein Respondent District Council) and Local Union No. 1752, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein Respondent Local 1752).

[2]The motion stated, in part:

> The parties agree that the charges, the Complaint and Notice of Hearing, the answer

stipulation and transferred the proceedings to the Board. Thereafter, the parties filed briefs with the Board. Briefs amici curiae were filed by the Chamber of Commerce of the United States of America, the American Federation of Labor and Congress of Industrial Organizations, and the Building and Construction Trades Department, AFL-CIO. Oral argument in the cases, and in

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to the complaint, and the Stipulation of Facts, including the exhibits attached thereto, constitute the entire record in these proceedings, and that no oral testimony is necessary or desired by any of the parties. The parties further stipulate that they wiave a hearing before an Administrative Law Judge, the making of findings of fact and conclusions of law by an Administrative Law Judge, and the issuance of an Administrative Law Judge's decision, and desire to submit this case for findings of fact, conclusions of law, and order directly to the Board.

the cases, and in related cases,[3] was held before the Board in Washington, D.C., on February 23, 1978. The parties presented arguments as did the amici curiae named above and Laborers' International Union of North America, AFL-CIO.

The Board has considered the entire record stipulated by the parties and the briefs and oral arguments of the parties and the amici curiae, and hereby makes the following findings and conclusions:

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[3]Colorado Building & Construction Trades Council (Utilities Services Engineering, Inc.), 239 NLRB No. 41 (1978); Carpenters Local No. 944, United Brotherhood of Carpenters and Joiners of America, AFL-CIO: and Carpenters Local No. 235, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Woelke & Romero Framing, Inc.), 239 NLRB No. 40 (1978); and International Union of Operating Engineers, Local No. 701, AFL-CIO; Oregon-Columbia Chapter, the Associated General Contractors of America, Inc. (Pacific Northwest Chapter of the Associated Builders & Contractors Inc.), 239 NLRB No. 43 (1978).

I. The Businesses of the Employers

At all times material herein, Donald Schriver, Inc., has been a builder-developer and general contractor in the building and construction industry in southern California, with a business address at 1605 Whittier Boulevard, Montebellow, California. In the normal course and conduct of its business operations, Schriver annually purchases and receives good and supplies valued in excess of $50,000 from suppliers located within the State of California which, in turn, purchase and receive those same goods and supplies directly from suppliers located outside the State of California.

The parties stipulated and we find that Schriver is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) and Section 8(e) of the Act and a person engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4)(ii)(A) of the Act.

Topaz Contracting & Development Co., Inc., is, and has been since January 1, 1977, a California corporation engaged as a framing and carpentry contractor and

builder-developer in the building and construction industry in southern California, with offices located in Norwalk, California. In the normal course and conduct of its business operations, Topaz annually purchases and receives goods and supplies valued in excess of $50,000 from suppliers located within the State of California which, in turn, purchase and receive those same goods and supplies directly from suppliers located outside the State of California.

The parties stipulated and we find that Topaz is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act and a person engaged in commerce or in an industry affecting commerce within the meaning of Section 8(b)(4)(i) and (ii)(A) of the Act.

II. The Labor Organizations Involved

The parties stipulated and we find that Respondent Trades Council, Respondent Local 1497, Respondent District Council, and Respondent Local 1752 are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) and Section 8(b) and (e) of the Act.

III. The Alleged Unfair Labor Practices

A. The Stipulated Facts

1. The case involving Schriver

In June 1972 Schriver was engaged as owner-builder in constructing a four-unit apartment complex in Montebellow, California, and employed roofers and/or carpenters working within the craft jurisdiction of Respondent District Council, and also a laborer. On or about June 12, 1972, Schriver entered into "Articles of Agreement" (herein Agreement) with Respondent Trades Council. The Agreement incorporated by reference[4] and bound Schriver to the

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[4]Art. II of the Agreement states: "The Employer, Developer and/or Owner-Builder agrees to abide by all of the terms and conditions of the current agreements of the respective crafts employed, including wages, hours, working conditions, health and welfare benefits, pension benefits, and other benefits, and further including any amendments, modifications, extensions, changes, supplements and renewals of said agreements negotiated by the parties thereto."

terms and conditions of employment of the effective master labor agreeement (herein MLA) between various employer associations and Respondent District Council, with which Respondent Locals 1752 and 1497 are affiliated. Both the Agreement and the 1974 MLA contained provisions restricting subcontracting and provisions concerning economic action by the labor organization party to the contract.[5]

By its terms the Agreement was to remain in effect for a 1-year period commencing on or about June 12, 1972, with automatic yearly renewals thereafter, subject to specified notice of terminatin by either party. Schriver did not give any notice of termination, and at all times material was signatory to the Agreement.

At no time before or after Schriver signed the Agreement did its employees designate the Repondent Trades Council or any affiliate or Respondent Local 1497 as their collective-bargaining representative. After signing the Agreement,

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[5]These provisions, discussed hereafter, are set forth in Appendix I to this Decision and Order.

Schriver did not require the subcontractors on its jobsites to be union subcontractors.

Schriver completed the Montebellow apartment complex project in 1972, and from 1972 to May 1975, as owner-builder, completed several large apartment projects and some "small" jobs. All work on Schriver's projects was subcontracted to other companies except for the work of carpenters and one laborer. At no time between the signing of the Agreement in 1972 and May 1975 did any union representative protest to Schriver's management the failure to abide by the Agreement.[6]

In May 1975 Schriver was engaged as owner-builder in the construction of a Montebellow townhouse project. It employed framer-carpenters who performed work within the craft jurisdiction of Respondent Local 1497, but who were not members of, nor represented by, Respondent Local 1497. On the townhouse project Schriver contracted with various subcontractors who were on the project at

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[6]There is no indication that Repondents had knowledge of Schriver's projects.

different times.[7] As a result some crafts worked alone on the project at times, while at other times many different crafts worked on the project at the same time. About 70 percent of the subcontractors were signatory to contracts with labor organizations covering the crafts involved.

On May 22, 1975, Jim Sogoian, a business representative of Respondent Local 1497,[8] approached Schriver's superintendent, Martin, at the townhouse jobsite, and asked whether the carpenters on the job were "union." Martin replied that they were not. Sogoian then stated that his Union would picket the jobsite if Schriver did not sign the Carpenters

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[7]The subcontractors performed the following work with their employees: insulation, plaster, drywall, painting, paving, finished carpentry, cabinets, floors, heating, sheet metal, masonry, formica, and finishing of exterior stairways and balconies.

[8]The parties stipulated that at all times material herein Sogoian has been an agent of Respondent Local 1497 within the meaning Sec. 2(13) of the Act.

agreement. The following day, at Martin's request, Sogoian brought to the jobsite a copy of the Carpenters contract--the MLA between Southern California General Contractors and United Brotherhood of Carpenters and Joiners of America, effective for an initial term from July 7, 1974, to June 15, 1977--and again stated that the Union would picket for the purpose of having the Carpenters agreement signed.

During the next week, Sogoian again visited the jobsite and informed Schriver's owner, Donald Schriver, that he was legally obligated to sign the Carpenters agreement. Sogoian declared that the Agreement which Schriver had signed in 1972 was still in effect since Schriver had never attempted to terminate it, and, under that Agreement, Schriver was bound to the Carpenters contract.

A day or two later, Donald Schriver telephoned the office of Respondent Trades Council and spoke with Mathis, its business representative.[9] Mathis confirmed what Sogoian had said

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[9]The parties stipulated that at all times material herein Mathis has been an agent of Respondent Trades Council within the meaning of Sec. 2(13) of the Act.

concerning Schriver's legal obligation to sign the Carpenters contract. Mathis then stated that the Carpenters Union would picket the jobsite and take legal action if Schriver did not sign the Carpenters agreement. Donald Schriver attempted to negotiate different terms to the Agreement with Respondent Trades Council, but his request to negotiate was denied, and Mathis again demanded that Schriver sign the standard Carpenters agreement.

On May 28, 1975, an agent of Respondent Trades Council, at the direction of Mathis, sent a telegram to Donald Schriver which, in relevant part, read:

> You subcontracted carpentry work to contractors who do not have an executed agreement with any union affiliated with the council. This action on your part violates Article IV of your agreement with the council dated June 12, 1972. Unless the above-mentioned contractors are immediately removed from the job, we have been authorized to sue you for an injunction and damages.

Respondent did not file a lawsuit against Schriver to enforce the Agreement, and Respondents have not engaged in any picketing against Schriver.

2. The Case Involving Topaz

Topaz, which was formed in January 1977, began work in February 1977 as a framing subcontractor, under contract with the owner-builder, on a townhouse project in Claremont, California.[10] In February and March 1977, it employed about 30 to 50 employees engaged in laboring and carpentry work. All crafts on the Claremont project were "union" except Topaz' employees. Topaz has not been a party to any labor agreement with any labor organization.

On or about February 22, 1977, the day after Topaz began work at Claremont, Larry Ruiz, a business representative of Respondent Local 1752,[11] spoke to Topaz' construction foreman, Tackett. Ruiz asked why Topaz was not signed up with the Union and said that the Union would have to picket if Topaz did not

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[10] At the time of its work at the Claremont project, Topaz was also working as a framing contractor on two other projects.

[11] The parties stipulated that at all times material herein Larry Ruiz has been an agent of Respondent Local 1752 within the meaning of Sec. 2(13) of the Act.

sign a contract with the Union. Later that same day, Mike Sullivan, labor relations consultant for Topaz, arrived at the jobsite while Ruiz was still there and asked Ruiz what contract he had to sign. Sullivan asked Ruiz if he meant the regular Carpenters contract with the Master Labor Agreement, and Ruiz replied, "Yes, and that is the only contract that I can sign with Topaz." Sullivan replied that the contract was illegal but that he was willing to sign the contract for the Claremont townhouse jobsite only, if the union would accept all the men working for Topaz and stop interfering with the owner-builders. Ruiz replied that he could not accept Sullivan's conditions and could not sign any contract other than the Master Labor Agreement.

On February 28, 1977, at a jobsite meeting with Ruiz and the attorney for the owner-builder of the Claremont townhouse project, Joe Eickholt, business representative of Respondent District Council,[12] informed Sullivan that

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[12]The parties stipulated that at all times material herein Eickholt has been an agent of Respondent District Council within the meaning of Sec. 2(13) of the Act.

the Union could not accept a contract limited to the Claremont project.

Thereafter, in support of their contract demand, Respondent Local 1752 and Respondent District Council picketed the Claremont construction project from March 4 to 14, 1977, with signs which read:

TOPAZ CONTRACTING & DEV.
UNFAIR
TO
CARPENTERS
LOCAL 1752
AFFILIATED WITH THE
LOS ANGELES BUILDING AND
CONSTRUCTION TRADE COUNCIL
NO AGREEMENT

At the time of picketing at the Claremont project, Topaz had 12 employees present on the project. At that time other employers working on the project included the plumbing subcontractor, employing plumbers and helpers, and a brick subcontractor, employing brick masons and helpers.

B. The Issues and Contentions

The complaint involving Schriver alleges that Respondent violated Section 8(e) by engaging in threatening conduct against Schriver which constituted a reentering or reaffirmation of the Agreement and the MLA. The complaint

also alleges that Respondents violated Section 8(b)(4)(ii)(A) by threatening conduct which had an object of requiring Schriver to reenter the Agreement and the MLA.[13]

The complaint involving Topaz alleges that Respondents violated Section 8(b)(4)(i) and (ii)(A) by picketing Topaz with an object of requiring the Company to enter into the MLA.

The parties have stipulated that the alleged threats and picketing by Respondents did in fact occur; and the stipulated facts support the conclusion that an object of the threats and picketing was to require Schriver and Topaz to reaffirm or adopt the subcontracting provisions alleged to be violative of Section 8(e). Therefore, the basic issue presented in these cases

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[13]Specifically, the complaint alleges that Respondent Local 1497 threatened to picket with an object of requiring Schriver to reenter or reaffirm the MLA, including Art. I, Sec. 103, 103.1, 103.2, and 103.3, and Art. III, Sec. 306; and Respondent Trades Council threatened to picket and to institute legal proceedings if Schriver did not comply with the Agreement, including Art. IV.

is whether the subcontracting provisions of the MLA and article IV of the Agreement are secondary within the meaning of Section 8(e) and, if so, whether they are protected by the construction industry proviso to Section 8(e). The General Counsel argues that the provisions in issue restrict subcontracting within the meaning of Section 8(e) and are not privileged by the proviso in light of the Supreme Court's view of the proviso set out in Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975). He further argues that, in any event, the provisions are not privileged because of "self-enforcement" measures in the contracts. It is the General Counsel's position that, in light of the Connell decision, the construction industry proviso privileges subcontracting provisions otherwise contrary to Section 8(e), only if all the following conditions are met: there is a valid collective-bargaining relationship between the signatory employer and the labor organization; the subcontracting restrictions are limited to sites where the employer has employees represented by the labor organization and to times when the employees are present; and the sub-contracting provisions do not require

that subcontractors be parties to an agreement with a particular union rather than a union in the generic sense. Respondents disagree with the General Counsel's interpretation of the Connell decision, and contend that the subcontracting provisions in dispute are protected by the proviso.

C. Discussion and Conclusions

Section 8(e) of the Act[14] declares it an unfair labor practice for

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[14]Sec. 8(e) reads:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry

a labor organization and an employer to enter into a contract whereby the employer agrees to refrain from dealing in the products of another employer or to cease doing business with any other person. Qualifying Section 8(e) is the construction industry proviso which exempts from application of that section

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relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or in industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

any agreement between a labor organization and an employer in the construction industry relating to the contracting of work to be done at a construction site.

The subcontracting provisions placed in issue by the General Counsel are plainly "union signatory" clauses which the Board has found to be secondary in thrust because they are directed at furthering general union objectives and regulating labor policies of employers other than the employer party to the contract.[15] Thus, article IV of the Agreement requires the contracting employer to subcontract all specified jobsite work "to a person, firm, partnership or corporation that is party to an executed current Agreement with the appropriate Union having work and territorial jurisdiction, affiliated with the Council in which area the work is performed." And Article I Section 103, of the 1974 MLA, requires that the contracting employer "or any of his subcontractors on the jobsite will not contract or subcontract work to be done

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[15]See Local 437, International Brotherhood of Electrical Workers, AFL-CIO (Dimeo Construction Co.), 180 NLRB 420 (1969); Woelke & Romero Framing, Inc., supra.

at the site of construction . . . except to a person, firm or corporation party to an appropriate, current labor agreement with the appropriate Union, or subordinate body, affiliated with the Building and Construction Trades Department, AFL-CIO, or with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or an affiliate thereof."[16] Accordingly, we find that these provisions are secondary restrictions which are proscribed by Section 8(e) unless they are protected by the construction industry proviso. We consider then whether the proviso privileges the restrictions.

It is clear that the subcontracting agreements in issue meet the express

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[16]Sec. 103.1 defines a subcontractor and requires that work be performed at the appropriate hourly rate and be reported to trust funds as required by the contract. Sec. 103.2 requires that all work performed by contractor or subcontractors be done in accordance with "each and all of the terms and provsions" of the contract. Sec. 103.3 requires that, if contractors or subcontractors shall subcontract jobsite work, provision shall be made in writing for compliance by subcontractors with the full terms of the contract.

requirements of the proviso that they be with employers in the construction industry and be confined to jobsite work. Question is raised, however, as to whether the protection of the proviso is applicable to the agreements in light of the Connell decision. We have considered the significance of that decision in interpreting the proviso in the several cases issued today. In Woelke & Romero, supra, we stated that, consistent with Connell, the construction industry proviso to Section 8(e) permits union signatory subcontracting clauses in the context of a collective-bargaining relationship, and possibly even without such a relationship if the clauses are aimed at avoiding the Denver Building Trades problem. As the disputed subcontracting agreement in Woelke & Romero was in the context of a collective-bargaining relationship, we found it privileged by the proviso.

In the instant proceeding, as discussed below, we also conclude that the disputed subcontracting clauses were sought in the context of collective-bargaining relationships and, hence, were within the protection of the proviso. Here, however, unlike the Woelke & Romero case where the collective-bargaining relationship was not challenged by the

parties, the sufficiency of the relationships between the Employers and the Respondent Unions is in issue. Determination of the issue requires an examination of the facts concerning the relationships and a consideration of what type of collective-bargaining relationship is needed to invoke application of proviso protection to subcontracting agreements.

An examination of the facts shows that Schriver entered into the Agreement with Respondent Trades Council in 1972, and the Agreement, which incorporated the applicable MLA, automatically renewed from year to year in the absence of notice to terminate. In 1975 when Respondent Trades Council and Respondent Local 1497 demanded that Schriver reaffirm the Agreement by signing the current 1974 MLA, Schriver refused. It does not appear, however, that Schriver repudiated its bargaining relationship with the Unions. Rather it asked to negotiate different terms. Respondent Trades Council refused to negotiate separate terms and again demanded that Schriver sign the 1974 MLA. Accordingly, we conclude that Schriver had an ongoing collective-bargaining relationship with Respondent Trades Council and Respondent Local 1497, and the disputed subcontract- ing provisions were sought in the context of this relationship.

In the case of Topaz, no preexisting bargaining relationship existed when the Unions demanded that Topaz sign the 1947 MLA. But it is clear the subcontracting provisions involved were sought in con- templation of a complete bargaining relationship on behalf of Topaz' employees. The contract that Respondents requested Topaz to sign was a complete one, setting forth wages and other requested Topaz to sign was a complete one, setting forth wages and other terms and conditions of employment for Topaz' employees. The subcontracting provisions were included in that total contract. There is, then, a clear distinction between the union-employer relationship that existed here and that which prevailed in Connell. This distinction, consistent with our holding in Woelke & Romero, supra, is critical to resolution of the proviso protection question. In Connell, the union had no past relationship with the employer, did not seek to establish one, sought an agreement dealing exclusively with the subject of subcontracting, and specifically disavowed any intent to seek recognition by Connell.[17] We find,

[17] The agreement which the Union requested Connell to sign stated, in part: "Whereas, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor." 421 U.S. 620.

therefore, that the subcontracting provision at issue here exists within the context of a collective-bargaining relationship as that phase is used in Connell.

In neither Schriver nor Topaz, however, was the collective-bargaining relationship one in which the Unions involved represented a majority of the unit employees. Nevertheless the contracts with Schriver and the proposed contract with Topaz were lawful by reason of Section 8(f) which exempts contracts with minority unions in the construction industry from the unfair labor practice prohibitions of Section 8(a) and (b) of the Act.[18] The subcontracting

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[18]Sec. 8(f) provides:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in

agreements, therefore, were in the context of valid 8(f) collective-bargaining relationships.

The fact that Respondent District Council and Respondent Local 1752 picketed for a short period in support of

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Section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of Section 9 of this Act prior to the making of such agreements, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final

their attempt to establish the 8(f) relationship does not in our view impair the effectiveness of the relationship for purposes of applying proviso protection. The picketing which lasted for less than 30 days did not contravene the limitations placed on organizational and recognitional picketing by Section 8(b)(7)(C); and picketing to obtain the contract containing subcontracting clauses, as distinguished from picketing to enforce such a contract, is permitted under the statute.[19]

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proviso to Section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Section 9(c) or 9(e).

[19] See Northeastern Indiana Building and Construction Trades Council, et al. (Centlivre Village Apartments), 148 NLRB 854 (1964); Los Angeles Building and Construction Trades Council (Joseph Freed & Benjamin H. Weber, d/b/a B&J Investment Company), 214 NLRB 562 (1974). See also Construction, Production & Maintenance Laborers Union, Local 383, AFL-CIO, et al. [Independent Contractors Associational] v. N.L.R.B., 323 F.2d 422 (C.A. 9, 1963).

The Charging Party and the Chamber of Commerce of the United States of America, amicus curiae, take the position that a collective-bargaining relationship, lawful only by reason of Section 8(f), is not sufficient to permit subcontracting agreements that are protected by the construction industry proviso. They contend that the only type of collective-bargaining relationship which afford proviso protection to subcontracting agreements is a relationship which meets the standards of Section 9(a); i.e., one in which the union involved represents a majority of the employees in an appropriate unit. The General Counsel takes the position that an 8(f) relationship is sufficient[20] once employees are hired pursuant to 8(f) contract.[21]

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[20]The General Counsel does not argue the sufficiency of the collective-bargaining relationship in these cases. He attacks the subcontracting clauses because, even if they are considered to be in the context of a collective-bargaining relationship, they are not cnfined by time and jobsite and they require subcontractors to contract with a particular union.

[21]We find it unnecessary to pass upon the General Counsel's position since here both Schriver and Topaz

In interpreting both the construction industry proviso and Section 8(b)(4)(A) in the past, the Board has made no distinction between agreements with a minority union permitted by Section 8(f) and agreements with a majority union having representative status under Section 9(a), and we see nothing in the Connell decision that requires such a distinction. In Connell, there was no collective-bargaining rela- tionship, nor was one sought. Accordingly, the Court did not speak to the question of what type collective-bargaining relationship would, or would not be sufficient to invoke application of proviso protection to a subcontracting agreement. To the extent, however, that the Court said anything on the issue, it implied that an 8(f) relationship would be sufficient. Thus, in rejecting an argument that the Board had previously approved general subcontracting agreements with "stranger" employees in B&J Investment Company,[22] the Court speculated that the employer and union, rather than strangers, "may have . . .

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had employees for whom a bargaining relationship was sought at all times in question.

[22] Los Angeles Building & Construction Trades Council (B&J Investment Company), supra, discussed at fn. 10 of Connell, supra.

[had] a prehire contract under Sec. 8(f)." Moreover, the Court referred to 8(f) prehire contracts as a "special consideration" that Congress gave to organizational campaigns of unions in the construction industry. (421 U.S. at 632).

Section 8(f) was enacted in 1959 at the same time Section 8(e) was added to the Act. Both Section 8(f) and the construction industry proviso to Section 8(e) were designed to accommodate the unique situation in the construction industry where contractors and subcontractors are in close relationship on the jobsite; employment is sporadic in nature; and employers need a ready supply of skilled employees and advance information concerning labor costs.[23] It is reasonable, therefore, to coordinate the protection the construction industry proviso provides to agreements in the industry with the type of bargaining relationship

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[23] See H. Rep. No. 741, 86th Cong., 1st Sess., I Leg. Hist. 759, 777 (LMRDA, 1959); National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612 (1967).

specially permitted in the industry by Section 8(f). The language of the proviso does not limit its protection to agreements made by a union with majority status and, as we read the decision, Connell does not set such a limitation. In the absence of statutory language or Supreme Court precedent, we see no reason to construe the construction industry proviso to include the requirement that an agreement protected by the proviso be with a majority union representative. Such a construction is not warranted in an effort to prevent use of 8(f) contracts as organizational "weapons." The statute provides other safeguards against abuse of employee organizational rights by 8(f) contracts. For example, Section 8(f) provides that a contract with a minority union shall not be a bar to a representation petition; Section 8(b)(7)(C) has been construed to limit picketing for recognition in the context of an 8(f) contract;[24] and Section

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[24]The Supreme Court has accepted the Board's position that picketing by a minority union to enforce an 8(f) contract ignored by the contracting employer party to the contract constitutes picketing for initial recognition within the meaning of Sec. 8(b)(7)(C). N.L.R.B. v. Local Union No. 103,

8(b)(4)(B) serves to prohibit picketing to enforce an 8(f) contract which incorporates a secondary subcontracting agreement.

An 8(f) collective-bargaining relationship may be more vulnerable to disruption than a 9(a) relationship because inquiry may be made into the union's majority status during the term of the contract. Nevertheless, under an existing 8(f) relationship, the union party to the 8(f) contract is the lawful representative of the employees covered by the contract. As their representative such union has an interest in restricting subcontracting in order to protect continuity of work and fringe benefits for the employees and to insure more stable and harmonious jobsite relations to the same extent a 9(a) representative has.

For the foregoing reasons, we conclude that the subcontracting agreements involved are protected by the construction industry proviso to Section 8(e), notwithstanding the Connell decision.

International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO [Higdon Contracting Co.], 434 U.S. 335 (1978).

There remains for consideration the General Counsel's contention that the subcontracting clauses are not protected by the proviso because of the contract's "self-enforcement" features. In support of this contention the General Counsel relies upon Article III, Section 306, of the 1974 MLA, incorporated by the Agreement. Article III covers strikes, lockouts, jurisdictional disputes, and the complaint quotes as pertinent the following part of Section 306:

> 306. Nothing contained in this Agreement, or any part thereof, shall affect or apply to the Union in any action it may take against any Contractor or subcontractor who has failed, neglected or refused to comply with or execute any settlement or decision reached at any step of the grievance procedure or through Arbitration under the terms of Article V hereof.[25]

According to the General Counsel, these provisions constitute a "broad" self-help

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[25] Art. V. covers the procedure for settlement of grievances and disputes, and provides for submission to that procedure of any grievances or disputes arising out of the interpretation or application of any of the terms or conditions of the contract.

clause which applies to union action with respect to employer failure to comply with grievance-arbitration decisions on any grievable subject, including the subcontracting restrictions in issue--Article I, Sections 103, 103.1, 103.2, and 103.3. Where contract terms permit resort to economic action to enforce secondary provisions, the General Counsel argues, the protection of the construction industry proviso is not available. We find merit to the General Counsel's contention. The self-enforcement features of Section 306 relate to and affect the subcontracting clauses, along with other matters to which the grievance-arbitration procedure applies. By removing contract restraints upon "any action" the union may take against an employer who fails to satisfy the specified grievance-arbitration obligations, Section 306 gives sanction to economic action by the union to enforce the subcontracting restrictions.[26] The Board has

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[26]Member Murphy does not read this clause the way her colleagues do. At best, she thinks this clause, unlike the clause in Pacific Northwest, supra, is ambiguous. It is well-settled Board law that where a clause in a contract can be construed two ways--one lawful and one

previously found that, although the proviso to Section 8(e) privileges onsite secondary agreements in the construction industry, such agreements may not be enforced by coercion, and that the proviso protection is lost where contract terms look to strikes or other economic pressure for enforcement of scondary agreements.[27]

unlawful--it is given the benefit of the doubt and construed to be lawful. This she chooses to do here. General Teamsters, Chauffeurs, Warehousemen and Helpers, Local 982, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (J.K. Barker Trucking Co., 181 NLRB 515 (1970). Accordingly, unlike the majority, she would find the contract within the protection of the construction industry proviso to Sec. 8(e) and would dismiss the complaint.

In any event, Member Murphy emphasizes that all five Board Members agree that the actual use of economic action to enforce a clause protected by the construction industry proviso under Sec. 8(e) violates the Act.

[27]See Muskegon Bricklayers Union #5, Bricklayers, Masons and Plasterers International Union of America (AFL-CIO) (Greater Muskegon General Contractors Association), 152 NLRB 360

Accordingly, we find that the union signatory, subcontracting clauses of the 1974 MLA--Article I, Sections 103, 103.1, 103.2, and 103.3--are violative of Section 8(e) of the Act by reason of self-enforcement provisions.[28] By

(1965); ETS-Hokin Corporation, 154 NLRB 839 (1965); Fresno, Madera, Kings and Tulare Counties Building and Construction Trades Council (Gage Brothers Construction), 218 NLRB 39 (1975); International Union of Operating Engineers, Local Union No. 12, AFL-CIO (Robert E. Fulton), 220 NLRB 530 (1975).

[28]Chairman Fanning dissents from this finding. He has previously stated his position that the mere existence of self-enforcement features in a contract does not make the construction industry proviso inapplicable to the contract. See, for example, his dissenting opinion in the Muskegon case cited above. Moreover, wholly apart from his disagreement with the general position of the majority that the proviso does not protect contracts with self-enforcement features, Chairman Fanning does not consider the provisions of Sec. 306 complained of in this case to constitute self-help measures. At most the provisions exempt economic action from the no-strike prohibitions of the contract. They do not affirmatively

threatening to picket Schriver to require it to reaffirm unlawful secondary agreements, Respondent Trades Council and Respondent Local 1497 reaffirmed and reentered a contract requiring an employer to cease doing business contrary to Section 8(e),[29] and engaged in coercion in violation of Section 8(b)(4)(ii)(A). By picketing Topaz to require it to enter into a secondary agreement prohibited by Section 8(e), Respondent District Council and Respondent Local 1752 violated Section 8(b)(4)(i) and (ii)(A).

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authorize any economic action and thus do not provide for enforcement of subcontracting provisions contrary to the prohibitions of Sec. 8(b)(4)(B). Chairman Fanning would therefore find the contract within the protection of the construction industry proviso, and would dismiss the complaint.

[29] See Brotherhood of Painters, Decorators and Paperhangers of America, Local Union No. 823, AFL-CIO (Independent Painting Contractors of New Mexico), 161 NLRB 620, 630 (1966).

The Remedy

Having found that the Respondents have engaged in unfair labor practices, we shall order them to cease and desist therefrom and to take certain affirmative action to effectuate the purposes of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in this proceeding, we make the following:

Conclusions of Law

1. Donald Schriver, Inc., and Topaz Contracting & Development Co., Inc., are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The following organizations are labor organizations within the meaning of Section 2(5) of the Act: Los Angeles Building and Construction Trades Council; Local Union No. 1497, United Brotherhood of Carpenters and Joiners of America; Los Angeles County District Council of Carpenters; Local Union NO. 1752, United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

3. The 1974 Master Labor Agreement between Southern California General Contractors and United Brotherhood of Carpenters and Joiners of America, and

the "Articles of Agreement" signed by Donald Schriver, Inc., and Los Angeles Building and Construction Trades Council, which incorporates the terms of the 1974 Master Labor Agreement, are agreements contrary to Section 8(e) of the Act by reasons of self-enforcement provisions.

4. By threatening to picket Donald Schriver, Inc., with an object of requiring it to reaffirm the 1974 Master Labor Agreement, Respondent Trades Council reentered the "Articles of Agreement" in violation of Section 8(e) of the Act and engaged in coercion in violation of Section 8(b)(4)(ii)(A) of the Act.

5. By threatening to picket Donald Schriver, Inc., with an object of requiring it to reaffirm the 1974 Master Labor Agreement, Respondent Local 1497 reentered the Master Labor Agreement in violation of Section 8(e) of the Act and engaged in coercion in violation of Section 8(b)(4)(ii)(A) of the Act.

6. By picketing Topaz Contracting & Development Co., Inc., with an object of requiring it to sign the 1974 Master Labor Agreement, Respondent District Council and Respondent Local 1752 violated Section 8(b)(4)(i) and (ii)(A) of the Act.

7. The above unfair labor practices are unfair labor practices affecting

commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Los Angeles Building and Construction Trades Council, Los Angeles, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Entering into, maintaining, giving effect to, or enforcing its "Articles of Agreement" with Donald Schriver, Inc., to the extent found unlawful herein by reason of self-enforcement provisions.

(b) Coercing or restraining Donald Schriver, Inc., or any person engaged in commerce or in an industry affecting commerce, where an object thereof is forcing or requiring an employer to enter into an agreement which is prohibited by Section 8(e) of the Act by reason of self-enforcement provisions.

2. Take the following affirmative action:

(a) Post at its business office and meeting halls copies of the attached notice marked "Appendix II."[30] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by an authorized representative of Respondent Trades Council, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Trades Council to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and deliver to the Regional Director for Region 21 sufficient copies of said notice, to be furnished by the Regional Director, for posting by Donald Schriver, if willing.

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[30] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent Trades Council has taken to comply herewith.

B. Local Union No. 1497, United Brotherhood of Carpenters and Joiners of America, Los Angeles, California, its officers, agents, and representatives, shall:

1. Case and desist from:

(a) Entering into, maintaining, giving effect to, or enforcing the 1974 Master Labor Agreement as to Donald Schriver, Inc., to the extent found unlawful herein by reason of self-enforcement provisions.

(b) Coercing or restraining Donald Schriver, Inc., or any person engaged in commerce or in any industry affecting commerce, where an object thereof is forcing or requiring an employer to enter into an agreement which is prohibited by Section 8(e) of the Act by reason of self-enforcement provisions.

2. Take the following affirmative action:

(a) Post at its business office and meeting halls copies of the attached notice marked "Appendix III."[31]

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[31]See footnote 30, supra.

Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by an authorized representative of Respondent Local 1497, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Local 1497 to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and deliver to the Regional Director for Region 21 sufficient copies of said notice, to be furnished by the Regional Director, for posting by Donald Schriver, Inc., if willing.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent Local 1497 has taken to comply herewith.

C. Los Angeles County District Council of Carpenters and Local Union No. 1752, United Brotherhood of Carpenters and Joiners of America, Los Angeles, California, their officers, agents, and representatives, shall:

1. Cease and desist from inducing or encouraging the employees of Topaz

Contracting & Development Co., Inc., or any other employer engaged in commerce or in an industry affecting commerce, to refuse to perform services in the course of their employment, and coercing or restraining Topaz Contracting & Development Co., Inc., or any person engaged in commerce or in an industry affecting commerce, where an object thereof is forcing or requiring an employer to enter into an agreement which is prohibited by Section 8(e) of the Act by reason of self-enforcement provisions.

2. Take the following affirmative action:

(a) Post at their business offices and meeting halls copies of the attached notice marked "Appendix IV."[32] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by an authorized representative of Respondent District Council and Respondent Local 1752, shall be posted by each immediately upon receipt thereof, and be maintained by each for 60 consecutive days thereafter, in

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[32]See fn. 30, supra.

conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by each to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and deliver to the Regional Director for Region 21 sufficient copies of said notice, to be furnished by the Regional Director, for posting by Topaz Contracting & Development Co., Inc., if willing.

(c) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps they have taken to comply herewith.

Dated, Washington, D.C. November 13, 1978.

John H. Fanning,
Chairman

Howard Jenkins, Jr.,
Member

John A. Penello,
Member

Betty Southard Murphy,
Member

John C. Truesdale,
Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX I

Contract Clauses in Issue as Described in the Amended Consolidated Complaint in Cases 21-CC-1680 and 21-CE-144 and Case 21--CC--1842--2

Article IV of the 1972 Articles of Agreement reads as follows:

ARTICLE IV

> The Employer, Developer and/or Owner-Builder agrees that he shall contract or subcontract all jobsite work set forth in Article I above to a person, firm, partnership or corporation that is party to an executed, current Agreement with the appropriate Union having work and territorial jurisdiction, affiliated with the Council in which area the work is performed.

Article I, Sections 103, 103.1, 103.2, and 103.3, and Article III, Section 306 of the 1974 Master Labor Agreement provide, in pertinent part, as follows:

> 103. The Contractor agrees that he or any of his subcontractors on the jobsite will not contract or subcontract work to be done at the site of construction, alteration, painting, or repair of a building, structure, or other work, except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body, affiliated with the Building and

Construction Trades Department, AFL-CIO, or with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or an affiliate thereof.

103.1. A subcontractor for the purposes of this Agreement, with the exception of the general provision immediately above, is defined as any person, firm or corporation holding a valid State Contractors' License and agrees under contract in writing with the Contractor or in writing with his subcontractors to perform any work covered by this Agreement, and employs workmen as employees to perform services covered by this Agreement, including the performance of labor, and/or furnishing or installation of material, or the operation of equipment. All employees of subcontractors will perform work at the appropriate hourly rate and will be reported to such trust funds as required by the Agreement.

103.2 All work performed by the Contractors or subcontractors and all services rendered for the Contractors or subcontractors, as herein defined, shall be rendered in accordance with each and all of the terms and provisions hereof.

103.3 If the Contractor or subcontractors shall subcontract jobsite work covered under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, including the furnishing and installation of material, performance of labor, and the operation of equipment, provision shall be made in written contract for the observance and compliance by his subcontractors with the full terms of this Agreement.

* * *

306. Nothing contained in this Agreement, or any part thereof, shall affect or apply to the Union in any action it may take against any Contractor or subcontractor who has failed, neglected or refused to comply with or execute any settlement or decision reached at any step of the grievance procedure or through Arbitration under the terms of Article V hereof. . . .

APPENDIX II

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or enforce Articles of Agreement with Donald Schriver, Inc., to the extent found unlawful by the Board by reason of self-enforcement provisions.

WE WILL NOT coerce or restrain Donald Schriver, Inc., or any person engaged in commerce or in any industry affecting commerce, where an object thereof is forcing or requiring an employer to enter into an agreement which is prohibited by Section 8(e) of the Act by reason of self-enforcement provisions.

LOS ANGELES BUILDING AND
CONSTRUCTION TRADES COUNCIL
(Labor Organization)

Date _____ By _____
(Representative) Title

APPENDIX III

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT enter into, maintain, give effect to, or enforce the 1974 Master Labor Agreement as to Donald Schriver, Inc., to the extent found unlawful by the Board by reason of self-enforcement provisions.

WE WILL NOT coerce or restrain Donald Schriver, Inc., or any person engaged in commerce or in an industry affecting commerce, where an object thereof is forcing or requiring an employer to enter into an agreement which is prohibited by Section 8(e) of the Act by reasons of self-enforcement provisions.

LOCAL UNION NO. 1497,
UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS
OF AMERICA
(Labor Organization)

Dated_____ By _____
(Representative) Title

APPENDIX IV

NOTICE TO EMPLOYEES AND MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT induce or encourage the employees of Topaz Contracting & Development Co., Inc., or any other employer engaged in commerce or in an industry affecting commerce, to refuse to perform services in the course of their employment, and WE WILL NOT coerce or restrain Topaz Contracting & Development Co., Inc., or any person engaged in commerce or in an industry affecting commerce, where an object thereof is forcing or requiring an employer to enter into an agreement which is prohibited by Section 8(e) of the National Labor Relations Act by reasons of self-enforcement provisions.

LOS ANGELES COUNTY DISTRICT
COUNCIL OF CARPENTERS
(Labor Organization)

Dated_____ By_____
(Representative) (Title)

LOCAL UNION NO. 1752, UNITED
BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA
(Labor Organization)

Dated_____ By_____

Appendix C

STATUTORY APPENDIX

Text of Labor Management Relations Act of 1947 As Amended (29 U.S.C. 151 et seq.)

Section 1. It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Section 8(b). It shall be an unfair labor practice for a labor organization or its agents --

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in,

a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by Section 8(e);

Section 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void; Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work; Provided further, That for the purposes of this subsection (e) and Section 8(b)(4)(B) the terms "any employer," "any person engaged in commerce or in industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other

employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry; Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of Section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service

with such employer, in the industry or in the particular geographical area; Provided, That nothing in this subsection shall set aside the final proviso to Section 8(a)(3) of this Act; Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Section 9(c) or 9(e).

Section 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment;

Section 201. That it is the policy of the United States that --

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment or grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

* * *

JUDGMENT

Before: MCGOWAN AND EDWARDS, Circuit Judges, and KASHIWA,* Judge, United States Court of Claims.

THIS CAUSE came on to be heard upon a petition filed by Donald Schriver, Inc., Sullivan-Kelley & Associates, Topaz Contracting & Development Company, Inc., and Sullivan and Associates, to review an order of the National Labor Relations Board issued against Los Angeles Building and Construction Trades Council, Los Angeles, California, its officers, agents, and representatives and Local Union No. 1497, United Brotherhood of Carpenters and Joiners of America, Los Angeles, California, its officers, agents, and representatives and upon an application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on June 17, 1980, and has considered the briefs and transcript of record filed in this cause. On October 20, 1980, the Court being fully advised in the premises handed down its opinion, dismissing the

*Sitting by designation pursuant to 28 U.S.C. §293(a) (1976).

Petition to review and modify the Board's Order, and enforcing the order of the Board issued against Respondents in that same proceeding. On Consideration whereof it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the Petitioners, Los Angeles Building and Construction Trades Council, Los Angeles, California, its officers, agents, and representatives and Local Union No. 1497, United Brotherhood of Carpenters and Joiners of America, Los Angeles, California, its officers, agents, and representatives, abide by and perform the directions of the Board in said order contained.

_____

Circuit Judge, United States Court of Appeals for the District of Columbia

_____

Circuit Judge, United States Court of Appeals for the District of Columbia

_____

Judge, United States Court of Claims

Office-Supreme Court, U.S.
FILED
APR 8 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1257

DONALD SCHRIVER, INC., SULLIVAN-KELLEY & ASSOCIATES, *et al.*,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT UNIONS IN OPPOSITION

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BRIEF FOR RESPONDENT UNIONS IN OPPOSITION

A. The petitioners provide no support for their assertion that the questions they present are substantial. Indeed, not one member of the court below or of the National Labor Relations Board (all of whom participated) have accepted any of petitioners' contentions. Instead all have concluded that petitioners' claims are belied by the language of the applicable statutory provisions read in light of their history and purpose and that those claims are not supported by judicial precedent. And while petitioners adopt the desperate expedient of relying on a panel decision in the Ninth Circuit (*Pacific Northwest Chapter, etc.* v. *NLRB*, 609 F.2d 1341 (C.A. 9)) to create the illusion of a conflict in the Circuits (Pet. 44-46)[1] that panel decision has now been sub-

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[1] "Pet." refers to the Petition for Certiorari. "Pet. App." refers to the Appendix for the Petition for Certiorari.

jected to rehearing *en banc*. Thus the true lesson of the Ninth Circuit proceedings is that this request for review is at best premature. The petition should therefore be denied.

B. The 8 questions presented in the petition raise two issues. Questions 1-5 concern the scope of §8 (e) of the National Labor Relations Act, as amended, (the "hot cargo" prohibition), and that section's construction industry exemption, read in light of *Connell Co.* v. *Plumbers and Steamfitters*, 421 U.S. 616. Questions 6-8 concern also the relationship between § 8(e) and § 8(f) (which permits prehire agreements in the construction industry) read in light of both *Connell* and *NLRB* v. *Iron Workers*, 434 U.S. 335. In the balance of this memorandum we briefly address each set of questions.

1. *The § 8(e) issue.* The complete rejection of petitioners' § 8(e) contentions resulted from a scrupulous review of the legislative materials and of this Court's *Connell* decision. The plain language of the § 8(e) proviso certainly includes the subcontracting clause at issue here: "*Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work." And the Court of Appeals captured the essence of the underlying legislative materials with admirable lucidity:

> "The [1959] Conference Report [in] briefly describ-[ing] the purpose of the construction industry proviso to § 8(e) * * * states:
>
> > 'The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agree-

ments. Picketing to enforce such contracts would be illegal under the *Sand Door* case (*Local 1796* [sic], *United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93 (1958)). To the extent that such agreements are legal today under section 8(b)(4) of the National Labor Relations Act, as amended, *the proviso would prevent such legality from being affected by section 8(e).'*

"Remarks by Senator Kennedy, * * *, make clear that Congress believed that subcontracting agreements were lawful in the construction industry prior to 1959:

> 'Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). The proviso is also applicable to all other agreements involving undertakings not to do work on a construction project site with other contractors or subcontractors regardless of the precise relation between them.'

105 CONG. REC. at 17900; II LEGISLATIVE HISTORY at 1433.

"The employers in this action have not cited a single case in which a subcontracting agreement was found to be unlawful prior to 1959 by reason of the fact that the agreement was not limited to particular jobsites at which signatory union workers were employed. There is absolutely no evidence that such agreements were prohibited prior to 1959, and the legislative history makes clear that if an agreement was lawful in 1959, the construction industry proviso 'would prevent such legality from being affected by section 8(e).' Conference Report, *supra*, at 39; I LEGISLATIVE HISTORY at 943.

"On the other hand, there is evidence that the pattern of collective bargaining in the construction industry in 1959 included subcontracting agreements such as those present in this case. Perhaps most influential is a report published in 1961, containing the results of a study which examined 'the prevalence and characteristics of subcontracting provisions in major collective bargaining agreements in effect in 1959, prior to the

Taft-Hartley amendments contained in the Labor-Management Reporting and Disclosure Act of 1959.' Lunden, *Subcontracting Clauses in Major Contracts*, 84 MONTHLY LABOR REVIEW 579 (part I), 715 (part II), at 579 (1961).

"After describing the prevalence of subcontracting agreements in the construction industry, the study noted:

> 'The single most frequent requirement, found in more than 50 major contracts, called for the subcontractor to comply with all the terms and conditions of the prime employer's agreement. This provision "blankets in" the subcontractor, no matter what project he works on in the local union's jurisdiction or which employer he works for.'

Id. at 715." [Pet. App. 39a-42a, footnote omitted, emphasis in original.]

It follows, as the Court of Appeals concluded:

"As developed above, the subcontracting agreements in the present case are consistent with the patterns of collective bargaining in the construction industry existing at the time of the 1959 amendments to the NLRA. In contrast, the subcontracting agreement sought in *Connell* was 'a relatively novel organizing tactic in the building trades.' St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 628 (1976). • • •

"In addition to the lack of evidence showing that the subcontracting provision in *Connell* was consistent with the pattern of bargaining in the industry, the Supreme Court in *Connell* was also faced with a union tactic that effectively avoided certain of the clear proscriptions of § 8(b)(4) and § 8(b)(7). Thus, the Court in *Connell* did not feel bound by the literal language of § 8(e) and, instead, imposed a limitation not expressly included in the statute in order to enforce a clear congressional mandate to restrict 'topdown' organizing. 421 U.S. at 628, 633.

"In the present case, the 'glaring loophole' found in *Connell* does not exist: no congressional purpose is un-

> dermined by the union conduct at issue. Instead, the agreements sought are fully consistent with the declared legislative purpose of maintaining the pattern of collective bargaining as it existed in the construction industry prior to 1959. In such a situation, we believe that it is not the province of this court to ignore the literal wording of the statute and impose a significant limitation that is not expressly included in the statute. Any further modification of the statute must come from Congress." [Pet. App. 48a-49a.]

The petition fails to demonstrate any error in the foregoing.

2. *The § 8(f) Issue.* Petitioners do not confine themselves to reading far more into the *Connell* case than was there decided. They likewise seek to expand this Court's decision in *NLRB* v. *Iron Workers*, 434 U.S. 335, which construed § 8(f) of the 1959 amendments to the Act, and seek support in that decision for their basic contention that the Board and the Court of Appeals erred insofar as they held that the respondent unions did not violate § 8(e) or § 8(b)(4)(A) in seeking the subcontracting clauses whose legality is at issue in this proceeding. But this further effort to contrive a conflict with the decisions of this Court is likewise wholly baseless. Indeed, in sustaining the decision of the NLRB, the *Iron Workers* Court acknowledged that the Board's view was not the only possible interpretation of § 8(f), but "represents a defensible construction of the statute and is entitled to considerable deference" (434 U.S. at 350). Petitioners' argument does not explain why the Board's unanimous interpretation of the same provision here is entitled to any less deference.

It is well at the outset to compare this case with what was at issue in *Iron Workers*. The Board had there held that the union, by picketing an employer for more than thirty days (without filing a representation petition) in order to compel him to enter into a § 8(f) agreement, had violated § 8(b)(7)(C). In contrast, no violation of § 8(b)(7)

was charged in the present case and the petition itself acknowledges that "section [8(b(7)] is irrelevant to the scope of the construction industry proviso to Section 8(e)." (Pet. 32.)

What petitioners do argue is that the Court's interpretation of § 8(f) in *Iron Workers* establishes that a pre-hire agreement does not create a collective bargaining relationship. But while the Court there held that unless the union obtains a majority, a § 8(f) agreement is not enforceable against the employer's will under § 8(a)(5) (*id.* at 345-346), and perhaps not under § 301(a) either (*id.* at 351-352),[2] there was no suggestion that such an agreement does not create a collective bargaining relationship. Indeed, in general labor law terms that is its very vice. See *Garment Workers* v. *Labor Board*, 366 U.S. 731. For as the *Iron Workers* Court also observed, "Section 8(f) is an exception to [the] rule" (*id.* at 345) that an employer and a union violate §§ 8(a) and (b) of the Act by entering into an agreement which grants the union exclusive recognition although it represents less than a majority of the employees. Thus, outside the construction industry, while such an agreement is illegal, it nonetheless creates a "a collective-bargaining relationship." It follows that the same result obtains within the construction industry where such agreements are lawful. Indeed, the *Iron Workers* opinion itself refers to a § 8(f) agreement (whether or not with a majority representative) as "a collective-bargaining contract" (*id.* at 345). Thus, even on a purely verbal level, *Iron Workers* lends no support to petitioner's reading of § 8(f).

But there is a more fundamental reason why the petition's reliance on § 8(f) and its interpretation in *Iron Workers* adds nothing to its argument on the scope of the

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[2] We read the Court's opinion as not deciding the § 301(a) issue, but only as rejecting the contention that a holding of unenforceability under § 301(a) would be inconsistent with *Retail Clerks* v. *Lion Dry Goods*, 369 U.S. 17.

subcontracting proviso to § 8(e). For the question as to what is a "collective-bargaining relationship" for purposes of the *Connell* rule that the subcontracting proviso "extends only to agreements in the context of collective-bargaining relationships" (421 U.S. 633) is to be answered by reading not *Iron Workers,* but *Connell* itself.[3] *Connell* shows that in determining that Local 100 was not seeking a "collective-bargaining relationship" the critical factor was "the fact that Local 100 had no interest in representing Connell's employees" (*id.* at 626, see also *id.* at 619). And in stating the issue as to the scope of the proviso the *Connell* opinion contrasts a collective bargaining relationship with an agreement between a union and "a 'stranger' contractor" (*id.* at 627). Not even petitioners argue that the unions and the employers from whom they sought the subcontracting agreements were "strangers" in that sense. For these reasons, and others which it stated, the court below was clearly right in concluding that the limitations which *Iron Workers* found in § 8(f) "are irrelevant to our conclusion * * * that a subcontracting provision sought in the context of an 8(f) prehire agreement occurs 'in the context of collective-bargaining' as required by *Connell.*" (Pet. 33-a.)[4]

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[3] Petitioners' entire argument on § 8(f) in general, and on *Iron Workers* in particular, repeats the analytical error long ago exposed by Professor Cook:

> The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has, and should have precisely the same scope in all of them runs all through legal discussions. It has the tenacity of original sin and must constantly be guarded against. [Cook, the Logical and Legal Bases of the Conflict of Laws, 150, quoted with approval in *Civil Aero. Bd.* v. *Delta Air Lines,* 367 U.S. 316, 328.]

[4] Petitioners' abuse of precedent is further illustrated by their reliance on Judge Learned Hand's opinion in *Douds* v. *Local 1250,*

CONCLUSION

For the foregoing reasons and those stated in the Brief in Opposition of the National Labor Relations Board the Petition for a Writ of *Certiorari* should be denied.

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Retail Store Union, 173 F.2d, 764, 769 (.A.2, 1949). (Pet. 37). That case obviously decided nothing about § 8(f) which did not come into the Act until ten years later. In fact, the *Local 1250* case involved the proviso to § 9(a) which permits an employee to present a grievance individually to an employer (if the employer wishes to hear him, and if the statutory representative is given the opportunity to be present). See *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50, 61, n. 12. The proposition Judge Hand decided was that in thus presenting a grievance, the employee may do so through a union other than the statutory representative.

Actually, Judge Hand's approach to statutory interpretation in *Local 1250* was the precise opposite of that which petitioners urge on this Court. In the sentence immediately following that from which petitioners quote (so selectively that the context is destroyed) Judge Hand wrote: "The Act says nothing on the subject; if it bans a union, it is by implication, and we can see no basis for such an implication" (173 F.2d at 769). That sentence states the approach followed by the Board and the Court below with respect to §§ 8(e) and 8(f) and further supports the correctness of their conclusion. Petitioners, by contrast, would have this Court *diminish* authority which construction unions are expressly granted in the § 8(e) proviso and in § 8(f).

No. 80-1257

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD SCHRIVER, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the construction industry proviso to Section 8(e) of the National Labor Relations Act privileges union signatory subcontracting clauses—*i.e.*, contract clauses barring subcontracting except to contractors who are signatories to agreements with particular unions—when they are sought in the context of a prehire agreement lawful under Section 8(f) of the Act.

2. Whether the construction industry proviso to Section 8(e) of the Act requires union signatory subcontracting clauses negotiated in the context of a collective-bargaining relationship to be limited in application to particular jobsites at which both union and nonunion workers are employed.

3. Whether the protection of the construction industry proviso is lost if a prehire agreement is obtained through picketing that does not exceed the limitations imposed by Section 8(b)(7) of the Act.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 635 F.2d 859. The decision and order of the National Labor Relations Board (Pet. App. 60a-110a) are reported at 239 N.L.R.B. 264.

JURISDICTION

The judgment of the court of appeals (Pet. App. 115a-116a) was issued on October 20, 1980. The petition for a writ of certiorari was filed on January 19, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act ("the Act") are set forth at Pet. App. 111a-114a. Also relevant is Section 8(b)(7)(C), 29 U.S.C. 158(b)(7)(C), which provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> * * * * *
>
> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing * * *.

STATEMENT[1]

1. a. Donald Schriver, Inc. ("Schriver") is a developer and general contractor in the building and construction industry which does business within the territorial jurisdiction of the Los Angeles Building and Construction Trades Council ("Trades Council")

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[1] The Board proceeding involves two cases (*Schriver* and *Topaz*), which were consolidated for purposes of decision. The facts in both cases were stipulated by the parties. (Pet. App. 61a-62a.)

and Local 1497, United Brotherhood of Carpenters and Joiners of America ("Local 1497"). Schriver employs only carpenters and a single laborer, and subcontracts all of its other jobsite work. (Pet. App. 7a.) In June 1972, Schriver and the Trades Council entered into "Articles of Agreement" ("the 1972 Agreement"), which incorporated by reference the terms set forth in the Master Labor Agreement ("MLA") between various employer associations and the Los Angeles County District Council of Carpenters ("District Council"), of which Local 1497 was a member (*ibid.*). The 1972 Agreement and the MLA contained provisions restricting the subcontracting of jobsite work to firms that were parties to current collective bargaining agreements with the signatory unions.[2] The subcontracting restrictions applied at "any time" and at "any jobsite where work within

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[2] For example, the 1972 Agreement provided, in pertinent part (Pet. App. 9a):

> The Employer, Developer and/or Owner-Builder agrees that he shall contract or subcontract all jobsite work * * * to a person, firm, partnership or corporation that is party to an executed, current Agreement with the appropriate Union having work and territorial jurisdiction, affiliated with the Council in which area the work is performed.

Similarly, a section in the MLA provided (*ibid.*):

> The Contractor agrees that he or any of his subcontractors on the jobsite will not contract or subcontract work to be done at the site of construction, alteration, painting or repair of a building, structure, or other work, except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body, affiliated with the Building and Construction Trades Department, AFL-CIO, or with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or an affiliate thereof.

the jurisdiction of the unions was performed," regardless of whether any union members "were present at that jobsite" (Pet. App. 9a). In addition, the MLA authorized the unions to take "any" action to enforce awards or resolutions obtained through the grievance and arbitration process.[3]

Although Schriver remained a party to the Agreement at all material times thereafter (Pet. App. 7a-8a), it did not employ union carpenters and did not require its jobsite subcontractors to employ union labor between June 1972 and May 1975 (Pet. App. 10a).[4] In May 1975, Schriver employed nonunion carpenters to work at its townhouse construction project in Montebello, California. Its other work was subcontracted to various firms, approximately 30% of which were nonunion. At certain times, some crafts worked at the project alone; at other times, many crafts worked simultaneously. (Pet. App. 10a.)

On May 22, 1975, Local 1497 Business Representative Jim Sogoian approached Schriver's Montebello jobsite superintendent and asked whether the carpen-

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[3] Section 306 of Article III of the MLA provided (Pet. App. 10a):

> Nothing contained in this Agreement, or any part thereof, shall affect or apply to the Union in any action it may take against any Contractor or subcontractor who has failed, neglected or refused to comply with or execute any settlement or decision reached at any step of the grievance procedure or through Arbitration under the terms of Article V hereof * * *.

[4] During that period, Schriver completed several construction projects without objection from the unions; there is, however, no evidence that the unions had notice of such projects (Pet. App. 10a).

ters on the job were "union." When the superintendent replied that they were not, Sogoian stated that Local 1497 would picket the jobsite unless Schriver signed the current carpenters' contract. (Pet. App. 10a-11a.)[5] During the negotiations that followed, representatives of Local 1497 and the District Council took the position that Schriver was bound by the 1972 Agreement to sign the current contract and twice again informed Schriver that its failure to do so would result in jobsite picketing. On June 20, Schriver filed with the Board unfair labor practice charges asserting that the subcontracting clauses contained in the contracts in question violated the proscription in Section 8(e) of the Act, 29 U.S.C. 158(e), against secondary agreements and that, therefore, the unions' threats to picket violated Section 8(b)(4)(ii)(A) of the Act, 29 U.S.C. 158 (b)(4)(ii)(A). (Pet. App. 11a, 60a.)[6]

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[5] That contract contained subcontracting clauses similar to those in the Agreement and the MLA (Pet. App. 11a); see note 2, *supra*.

[6] Section 8(e) of the Act, 29 U.S.C. 158(e), bans "hot cargo," or secondary, agreements between employers and unions. Section 8(b)(4)(A) of the Act, 29 U.S.C. 158 (b)(4)(A), makes it unlawful for a union to picket with an object of forcing an employer "to enter into any agreement which is prohibited by section 8(e)." However, a proviso to Section 8(e) exempts from its prohibition "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work * * *." Accordingly, in the construction industry, the legality, under Section 8(b)(4)(A), of picketing to secure a "hot cargo" agreement turns on the question whether the agreement is protected by the Section 8(e) proviso. See note 10, *infra*.

b. In February 1977, Topaz Contracting and Developing Co., Inc. (Topaz), a framing contractor doing business within the territorial jurisdiction of Local 1752, United Brotherhood of Carpenters and Joiners of America ("Local 1752") and the District Council, began carpentry work on a townhouse project in Claremont, California. All crafts on the project were "union" except for the 30 to 50 workers employed by Topaz, which has never been a party to a labor agreement with any labor organization. (Pet. App. 11a-12a.) On February 22, Local 1752 Business Representative Larry Ruiz approached Topaz's construction foreman and asked why Topaz had not signed up with the union. Ruiz stated that the union would picket the jobsite if Topaz did not sign the current carpenters' contract. During the negotiations that followed, a labor relations consultant employed by Topaz asserted that the contract in question was "illegal," but that Topaz would be willing to sign it if its terms were limited to the Claremont jobsite only and if the union would accept all of Topaz's present employees. Ruiz replied that such conditions were unacceptable and that he could sign only the standard agreement. (Pet. App. 12a.)

In support of its contract demands, Local 1752 and the District Council picketed the Claremont project for 10 days commencing March 4. The placards read:

Topaz Contracting & Dev.
UNFAIR
to
Carpenters
Local 1752
Affiliated with the
Los Angeles Building and Construction
Trades Council
No Agreement

At the time of the picketing, Topaz had 12 employees on the project. Other employers working at that time included a plumbing subcontractor, employing union plumbers and helpers, and a brick subcontractor, employing union brick masons and helpers. On March 9, Topaz filed with the Board unfair labor practice charges asserting that the subcontracting clauses contained in the contracts in question violated the Section 8(e) proscription against secondary agreements and, therefore, that the unions' picketing and threats to picket in order to obtain the clauses violated Section 8(b)(4)(i) and (ii)(A) of the Act. (Pet. App. 12a-13a, 60a, 74a.)

2. The Board agreed with petitioners' contention that the union signatory subcontracting clauses sought by the unions were secondary in thrust and therefore violative of Section 8(e) of the Act, unless saved by the construction industry proviso to that section. The Board further noted that in a companion case, *Woelke & Romero*,[7] it had held that, under this Court's decision in *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 633 (1975), the construction industry proviso only permits union signatory subcontracting clauses that are sought "in the context of a collective-bargaining relationship" (Pet. App. 81a).[8] The Board,

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[7] *Carpenters Local No. 944 (Woelke & Romero Framing, Inc.)*, 239 N.L.R.B. 241, 248-250 (1978), enforcement denied in relevant part *sub nom. Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.* v. *NLRB*, 609 F.2d 1341 (9th Cir. 1979), rehearing en banc granted, Nos. 78-3469, *et al.* (9th Cir. Aug. 30, 1980).

[8] In *Woelke & Romero, supra*, the Board added that, under *Connell*, such clauses are privileged "possibly even without [a collective-bargaining] relationship if the clauses are aimed

however, rejected petitioners' argument (Pet. App. 87a) that only a bargaining relationship between an employer and a representative of a majority of the unit employees within the meaning of Section 9(a) of the Act, 29 U.S.C. 159(a), would satisfy the *Connell* test. Rather, the Board determined (Pet. App. 88a-91a) that the contracts in question—which were "complete * * *, setting forth wages and other terms and conditions of employment for [petitioners'] employees" (Pet. App. 83a) and which constituted lawful "pre-hire" agreements under Section 8(f) of the Act[9]—provided a sufficient "collective-bargaining relationship" to meet the requirements of *Connell*.

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at avoiding the *Denver Building Trades* problem[,]" *i.e.* the friction created by having union and nonunion employees working together on the same jobsite. 239 N.L.R.B. at 250. See *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951); *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100, supra*, 421 U.S. at 629-631.

The Board also concluded in *Woelke & Romero*, that where union signatory subcontracting clauses are sought in the context of a collective-bargaining relationship, they need not be limited to particular jobsites on which union and nonunion employees are working together in order to be privileged under the proviso. 239 N.L.R.B. at 248-250.

[9] Section 8(f) of the Act, 29 U.S.C. 158(f), provides, in pertinent part, that it shall not be an unfair labor practice

> for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (*or who, upon their employment, will be engaged*) in the building and construction industry with a labor organization of which building and construction employees are members * * * because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [29 U.S.C. 159] prior to the making of such agreement * * *. [Emphasis added.]

The Board also concluded that the picketing of Topaz for the purpose of securing the subcontracting clauses in a Section 8(f) context did not "impair the effectiveness of the relationship for purposes of applying proviso protection" (Pet. App. 86a). The Board acknowledged that such picketing is equivalent to recognitional picketing and is thus subject to the limits of Section 8(b)(7)(C) of the Act, 29 U.S.C. 158(b)(7)(C), which provides in pertinent part that it shall be an unfair labor practice for a union to picket for recognitional or organizational purposes for more than a reasonable period of time, not to exceed 30 days, without having filed a petition for a representation election with the Board (Pet. App. 86a, 90a). The Board noted, however, that the 10 days of picketing at the Topaz jobsite did not exceed the Section 8(b)(7)(C) limitations. Relying on settled law, the Board also observed that picketing to secure a subcontracting clause privileged by the construction industry proviso of Section 8(e) does not violate Section 8(b)(4)(A) of the Act. (Pet. App. 86a & n. 19.)[10]

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[10] The Board and the courts have held that picketing to obtain a subcontracting agreement which is privileged by the construction industry proviso to Section 8(e) of the Act does not violate Section 8(b)(4)(A)'s ban against economic pressure to force an employer "to enter into any agreement which is prohibited by Section 8(e)." However, since Congress did not intend subcontracting agreements privileged by the construction industry proviso to be enforced by means that would violate Section 8(b)(4)(B) of the Act (see H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959)), the Board and the courts have further held that picketing to obtain such a subcontracting agreement violates Section 8(b)(4)(B), 29 U.S.C. 158(b)(4)(B), where it also has as an object causing a cessation of business between the general contractor and an existing and identified nonunion subcontractor. See *Northeastern Indiana Bldg. & Constr. Trades*

However, the Board (with two Members dissenting) found that the subcontracting clauses lost the protection of the proviso because of Section 306 of Article III of the MLA (note 3, *supra*), which permitted the unions to resort to economic action if signatory employers failed to comply with grievance-arbitration decisions on any grievable subject, including the subcontracting restriction.[11] Accordingly, the Board found that Local 1497 and the Trades Council violated Section 8(b)(4)(ii)(A) of the Act by threatening to picket Schriver with an object of requiring it to reaffirm the Master Labor Agreement and violated Section 8(e) by again entering into that agreement with it. Similarly, it found that the District Council and Local 1752 violated Section 8(b)(4)(i) and (ii)(A) of the Act by picketing Topaz with an object of requiring it to sign the MLA. (Pet. App. 92a-98a.) The Board ordered the unions to cease and desist from the unfair labor practices found and to post appropriate notices (Pet. App. 99a-104a).

3. The court of appeals sustained the Board's decision. The court agreed that this Court's decision in *Connell* holds that the construction industry pro-

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Council (Centlivre Village Apartments), 148 N.L.R.B. 854, 856-858 (1964); *Orange Belt Dist. Council of Painters No. 48* v. *NLRB*, 328 F.2d 534, 537 (D.C. Cir. 1964); *Essex County & Vicinity Dist. Council of Carpenters* v. *NLRB*, 332 F.2d 636, 641 (3d Cir. 1964); *Constr., Prod. & Maintenance Laborers Union, Local 383* v. *NLRB*, 323 F.2d 422, 425 (9th Cir. 1963).

[11] A subcontracting agreement loses the protection of the construction industry proviso if it contains terms that sanction strikes or other self-help measures in the event subcontracting in violation of the agreement occurs, because carrying out such measures would violate Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B). See *Bricklayers & Stone Masons Union, Local No. 2* v. *NLRB*, 562 F.2d 775, 787-788 (D.C. Cir. 1977). See also note 10, *supra*.

viso of Section 8(e) generally applies only to those subcontracting clauses that are sought "in the context of collective-bargaining relationships" (Pet. App. 27a). The court further agreed that Section 8(f) pre-hire agreements—such as those in the subject case—establish such a context. Observing that Section 8(f) represented a congressional effort to adjust the Act to the unique structure of the employment relationship in the construction industry and that prehire agreements "provide[] the very means by which unions and employers typically initiate a bargaining relationship in th[at] * * * industry" (Pet. App. 28a), the court concluded that "[t]here is no reason why Congress would *protect* subcontracting agreements in the construction industry under § 8(e), and at the same time *prohibit* the most common and possibly the only effective means by which such an agreement may be obtained" (Pet. App. 33a; emphasis in original).

The court also rejected petitioners' contention that the subcontracting clauses were void because they were not restricted in application to particular jobsites and particular times at which petitioners had union members present. The court explained that the legitimate purpose of subcontracting clauses was not only to "avoid 'friction' on the jobsite that may arise when both union and nonunion workers are present," but also "to protect contract standards in the construction industry"—a goal that would be "unattainable in that industry if subcontracting agreements were not allowed" (Pet. App. 44a).

Finally, the court rejected (Pet. App. 18a-19a n.11) petitioners' argument that picketing to obtain a Section 8(f) contract is altogether proscribed by the Act. The court found that the congressional intention

to limit coercion in securing such contracts was effectuated by Section 8(b)(7)(C), which limits such picketing to a "reasonable period of time not to exceed 30 days," absent the filing of a representation petition pursuant to Section 9(c) of the Act, 29 U.S.C. 159(c). Because the coercion employed by the unions here—a threat to picket Schriver and 10 days of picketing at the Topaz jobsite—did not contravene those limits, the court agreed with the Board that such conduct did not deprive the unions of the protection of the proviso to Section 8(e).[12]

ARGUMENT

Although the issues decided by the court below are of importance in the application of the National Labor Relations Act to the construction industry, the court's decision is correct and is not inconsistent with the decisions of any other circuit.[13] Review by this Court is therefore unwarranted.

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[12] The court, however, sustained the Board's finding that the subcontracting clauses fell outside the protection of the proviso, and thus violated Section 8(e) of the Act, insofar as they authorized the unions to use economic action to enforce the clauses; and the court enforced the Board's order in this regard (Pet. App. 57a-59a). The petition does not raise any question concerning this aspect of the court's decision.

[13] The decision in *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc.* v. *NLRB*, 609 F.2d 1341 (9th Cir. 1979)—which held, contrary to the court below, that subcontracting clauses are valid under the construction industry proviso only insofar as they apply to jobsites and times at which the employer or his subcontractor has union members present—does not create a conflict that warrants resolution by this Court at this time. For, on August 19, 1980, the Ninth Circuit, pursuant to the Board's petition, ordered rehearing en banc in that case. Argument was heard by an 11-member court on October 16, 1980, and the case is under advisement.

1. It is clear that the construction industry proviso to Section 8(e), read literally, would privilege the subcontracting clauses at issue here, for those clauses undeniably constitute "agreement[s] between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction * * * of a building, structure, or other work * * *." Section 8(e), 29 U.S.C. 158(e). In *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), however, this Court held that the proviso was not to be read literally, but rather "must be interpreted in light of the statutory setting and the circumstances surrounding its enactment." *Id.* at 628. In that case, the union had picketed certain general contractors, including Connell, for the sole purpose of compelling the contractors to agree to subcontract only to firms signatory to a current union bargaining agreement. The union had no interest in representing Connell's employees; indeed, Connell employed no workers of the type whom the union represented. Since the union's picketing had no recognitional or organizational purpose, it fell outside the restrictions that Section 8(b)(7) places on recognitional and organizational picketing. See *Dallas Bldg. & Constr. Trades Council* v. *NLRB*, 396 F.2d 677, 682 n. 8 (D.C. Cir. 1968) ("picketing is permissible [under Section 8(b)(7)] if the coverage of the proposed contract is limited to the type of work which is never performed by the general contractors' own employees"). Accordingly, the only possible restriction on the union's picketing in *Connell* was Section 8(b)(4)(A), which precludes picketing to obtain "any agreement which is prohibited by Section 8(e)."

The union argued in *Connell*, however, that the agreement it sought was protected by the construction industry proviso to Section 8(e) and that therefore the picketing did not violate Section 8(b)(4)(A). Had the Court accepted this argument, the union would have altogether avoided the restrictions on picketing carefully constructed by Congress in Sections 8(b)(4) and 8(b)(7). Construction unions would then have enjoyed virtually the same rights that garment workers' unions have under the second proviso to Section 8(e) to engage in "top-down" organizing and in unlimited picketing to obtain secondary subcontracting agreements outside of any contemplated collective-bargaining relationship between the picketing union and the employer.[14]

The Court declined to read the construction industry proviso as broadly as the union urged, "[a]bsent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on 'top-down' organizing * * *." 421 U.S. at 633. Accordingly, it construed the construction industry proviso exemption as applicable "only to agreements in the context of collective-bargaining relationships * * *" (*ibid.*). The Court thereby assured that picketing for secondary subcontracting clauses could not be used as an unlimited means for "top-down" organizing. Picketing to obtain a collective-bargaining agreement

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[14] The second proviso to Section 8(e) privileges secondary subcontracting agreements in the garment industry, and unlike the construction industry proviso exempts efforts to enforce those agreements from the prohibitions of the Act, including Section 8(b)(4)(B), 29 U.S.C. 158(b)(4)(B). See *Danielson* v. *Joint Board of Coat, Suit & Allied Garment Workers' Union*, 494 F.2d 1230 (2d Cir. 1974).

containing a secondary subcontracting clause would be restricted under Section 8(b)(7)(C) to a reasonable period, not to exceed 30 days, unless the picketing union had filed an election petition;[15] and picketing to obtain a secondary subcontracting clause not in the context of a collective-bargaining relationship would be proscribed altogether by Section 8(b)(4)(A).[16]

2. In the present case, the unions were not the designated bargaining representative of a majority of either Schriver's or Topaz' employees; thus the subcontracting agreements were not sought in the context of a Section 9(a) collective-bargaining relationship, but rather as part of a Section 8(f) prehire agreement between the unions and the employer-contractors. Petitioners contend (Pet. 27) that a Section 8(f) relationship is not sufficient to satisfy the collective-bargaining relationship requirements of

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[15] See *Bldg. & Constr. Trades Council of Philadelphia (Samuel E. Long, Inc.)*, 201 N.L.R.B. 321, 323-325 (1973), enforced mem., 485 F.2d 680 (3d Cir. 1973), cert. denied, 416 U.S. 937 (1974).

[16] The Court did suggest one possible exception to the proscription against secondary subcontracting agreements outside of a collective-bargaining relationship, noting that, "in light of congressional references to the *Denver Building Trades* problem," the protection of the Section 8(e) proviso extends "possibly to common-situs relationships on particular jobsites as well." 421 U.S. at 633. In *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675 (1951), the Court had held that each contractor at a construction site should be considered as a separate employer for secondary boycott purposes, thereby denying legal significance to the reality of the close relationship between contractors and subcontractors at the jobsite and severely limiting the economic pressure that unions could use to assert their interests in having jobsite work performed by unionized employers.

Connell—that such requirements can be satisfied only if the union demanding the subcontracting agreement is "the certified bargaining representative or otherwise legally entitled to the presumption of a majority status." The Board and the court below properly rejected this contention.

Section 8(f) was enacted in 1959 because of the peculiar nature of employment and collective bargaining in the building and construction industry. Thus, as the Senate Report explained (S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959)):

> In the building and construction industry it is customary for employers to enter into collective bargaining agreements for periods of time running into the future, perhaps 1 year or in many instances as much as 3 years. Since the vast majority of building projects are of relatively short duration, such labor agreements necessarily apply to jobs which have not been started and may not even be contemplated.

For these reasons, and because the practice of signing such agreements was "not entirely consistent with Wagner Act rulings of the NLRB that exclusive bargaining contracts can lawfully be concluded only if the union makes its agreement after a representative number of employees have been hired" (*ibid.*), Congress added Section 8(f) to the Act.[17] That provision authorizes employers in the construction industry to enter into comprehensive agreements with labor organizations that have not established majority status in the manner provided by Section 9 of the Act. As

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[17] The history of Section 8(f) is summarized in *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335, 348-349 (1978).

the court below correctly concluded (Pet. App. 33a; emphasis in original):

> The same Congress that adopted § 8(f) in 1959 added to the newly enacted § 8(e) a proviso that expressly authorizes subcontracting agreements in the construction industry. There is no reason why Congress would *protect* subcontracting agreements in the construction industry under § 8(e), and at the same time *prohibit* the most common and possibly the only effective means by which such an agreement may be obtained. We hold, therefore, that a subcontracting agreement sought in the context of an 8(f) prehire agreement does not violate § 8(e).

To conclude that a prehire agreement, no less than an agreement with a union which has established its majority status, qualifies for the protection of the construction industry proviso to Section 8(e) does not ignore the thrust of the *Connell* decision. As the court below explained (Pet. App. 33a-34a):

> *Connell* required a collective bargaining relationship to guarantee that a union seeking a subcontracting agreement could not sidestep § 8(b)(7) and apply unlimited secondary pressure on nonunion subcontractors. An attempt by a union to establish an 8(f) relationship is sufficient to satisfy that concern; a union seeking an 8(f) agreement covering wages and other terms of employment remains subject to the restrictions of § 8(b)(7). *Dallas Building and Construction Trades Council* v. *NLRB*, 396 F.2d 677 (D.C. Cir. 1968). * * * [18]

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[18] The court further noted (Pet. App. 29a):

> [T]he unions in the present case explicitly sought to *secure* representation of Schriver's and Topaz'[s] em-

3. Petitioners further contend (Pet. 41-44) that the subcontracting clauses are void because they are not limited in application to particular jobsites and particular times at which the general contractor or its subcontractors have union members present. The court below correctly concluded (Pet. App. 36a-50a) that neither the construction industry proviso itself, nor the "statutory setting and the circumstances surrounding its enactment" (*Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100, supra*, 421 U.S. at 628) supports such a restriction.

a. The language of the proviso contains no limitations such as those proposed by petitioners. Instead, the proviso broadly authorizes agreements in the construction industry "relating to the contracting or subcontracting of work to be done at the site of the construction." Section 8(e), 29 U.S.C. 158(e). The agreements in the present case thus plainly fall within the literal protection of the proviso.

The legislative history of the proviso, moreover, is consistent with this construction. As this Court recognized in *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 634-637 (1967), the 1959 Congress believed that, under then-existing law (see *Local 1976, United Brotherhood of Carpenters Union* v. *NLRB* (*Sand Door*), 357 U.S. 93 (1958)), it was not unlawful for employers and unions voluntarily to enter into "hot cargo" agreements. Congress, regarding this as an

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ployees. The unions sought to enter into a complete agreement with the contractors, covering the wages, benefits, and other conditions of employment of the contractors' own employees. Their primary goal was not to apply organizational pressure on *other* firms, but to standardize the working conditions of the employees of these contractors. * * * [Emphasis in original; footnote omitted.]

undesirable "loophole" in the protections against secondary boycotts (*NLRB* v. *Enterprise Ass'n of Pipefitters, Local 638*, 429 U.S. 507, 517 (1977)), moved to close it. The Senate version of Section 8(e) would have made it an unfair labor practice only for employers in the trucking industry to agree to boycott the products of any other employer. See H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 39 (1959). The House amended the bill to make it an unfair labor practice for *any* labor organization and *any* employer to enter into such an agreement. The conference committee adopted the House amendment, but added three provisos, one of which was the construction industry proviso. *Ibid.*

With respect to that proviso, Senator Kennedy, the Chairman of the Conference Committee, reported back to his colleagues that the Senate "insisted upon a qualification * * * for agreements relating to work to be done at the site of a construction project[,]" and he noted that this change was "necessary to avoid serious damage to the pattern of collective bargaining in [the industry]." 105 Cong. Rec. 17899 (1959), 2 *Legislative History of the Labor Management Reporting and Disclosure Act of 1959* ("2 *Leg. Hist. LMRDA*") 1432. He added (105 Cong. Rec. at 17900, 2 *Leg. Hist. LMRDA* 1433):

> The first proviso * * * is intended to preserve the present state of the law * * * with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.
>
> * * * * *
>
> Agreements by which a contractor in the construction industry promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). * * *

In sum, the legislative history makes it clear that "the construction industry proviso to § 8(e) was intended to preserve the pattern of collective bargaining in the construction industry as it existed prior to 1959 and the enactment of § 8(e)" (Pet. App. 40a-41a).

b. As the court below observed (Pet. App. 42a), a Department of Labor study of subcontracting provisions in collective-bargaining agreements in effect in 1959 established that provisions such as those at issue in this case were then prevalent in the construction industry, and "not one agreement was found to limit the applicability of the subcontracting restriction to particular jobsites at which both union and nonunion workers were employed" (citation and emphasis omitted). See also Pierson, *Building-Trades Bargaining Plan in Southern California*, 70 Monthly Lab. Rev. 14, 19 (1950). Accordingly, the Board and the courts have, since 1959, repeatedly upheld subcontracting clauses not limited to particular jobsites. See cases compiled in *Carpenters Local 944 (Woelke & Romero Framing, Inc.)*, *supra*, 239 N.L.R.B. at 247-248 & n. 13.

c. Petitioners' contention that subcontracting agreements are protected by the construction industry proviso to Section 8(e) only when they are limited to particular jobsites and particular times at which union members are already employed is based—as was the now-vacated panel decision in *Pacific Northwest* (see note 13, *supra*) on which petitioners rely (Pet. 44-46)—on the premise that the proviso was merely intended to avoid the *Denver Building Trades* problem—*i.e.*, the friction on the jobsite that may arise when both union and nonunion workers are present. However, as the court below

recognized (Pet. App. 44a), subcontracting agreements serve a much broader and more fundamental purpose—i.e., protection of "contract standards in the construction industry, a goal that would be unattainable in that industry if subcontracting agreements [of the type here] were not allowed."

Thus, because of the "temporary and transitory nature of employment in the construction industry," union workers are concerned not simply that "they will be replaced at the particular location at which they are working with nonunion workers," but that "the union-represented pool of workers to which they belong will be 'replaced' at future projects" (Pet. App. 45a). "Since the employee pool is not attached to a particular employer but to the industry as a whole, workers in the construction industry have no interest in forbidding 'contracting-out' altogether," but instead have a substantial interest "in assuring that their collective-bargaining agreement is respected on each jobsite upon which their employer works whether he does the work himself or subcontracts it out" (*id.* at 45a-46a.) Accordingly, to require subcontracting agreements to be renegotiated on a jobsite by jobsite basis, or limited in application to jobsites where union workers are already present, would subvert the primary purpose of subcontracting agreements in the construction industry. Moreover, as the court below noted (Pet. App. 46a), "it is simply not feasible for employers and unions in the construction industry to renegotiate agreements on each jobsite, a fact recognized by Congress in enacting § 8(f) in 1959." See S. Rep. No. 187, 86th Cong., 1st Sess. 28 (1959) (labor agreements in the construction industry "necessarily apply to jobs which have not been started and may not even be contemplated").

This Court's decision in *Connell* does not compel a different view. As shown (pages 13-15, *supra*), the Court in *Connell* was not dealing with a subcontracting agreement in the context of a collective-bargaining relationship, as here. Moreover, in referring to the *Denver Building Trades* problem, the Court decidedly did not, contrary to petitioners (Pet. 41), hold that a valid subcontracting clause must occur *both* in "the context of a collective-bargaining relationship" *and* with reference to a particular jobsite. Rather, in referring to jobsite friction, the *Connell* Court was simply positing an *additional* context in which such clauses might receive proviso authorization, *notwithstanding* the absence of the generally required "context of a collective-bargaining relationship." (See 421 U.S. at 635; see also note 8, *supra.*)

4. Finally, petitioners argue (Pet. 39-40) that the unions "violat[ed] Congress'[s] proscription against coercive attempts to obtain employer assent to prehire agreements" by picketing and threatening to picket the jobsites in the subject case. The legislative history of the 1959 amendments to the Act, however, does not support this argument. Rather it demonstrates that, although Congress did not intend Section 8(f) "to authorize the use of force, coercion, strikes or picketing to compel any [employer] to enter into such prehire agreements,"[19] Congress recognized that the provision did not, by its terms, limit the right of a union to strike or picket for such agreements.[20]

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[19] H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 41-42 (1959). See also citations to legislative history compiled in *Connell, supra,* 421 U.S. at 633 n. 12, and *NLRB* v. *Local Union No. 103, Iron Workers,* 434 U.S. 335, 348 n.10 (1978).

[20] 105 Cong. Rec. 18134-13135 (1959), 2 *Leg. Hist. LMRDA* 1721 (remarks of Rep. Thompson, member of Conference Committee and House floor manager).

Nor do the terms of the construction industry proviso to Section 8(e) restrict its protection to voluntary agreements. If coercion to obtain a prehire agreement containing a union signatory subcontracting clause is to be proscribed, it can only be through Sections 8(b)(4)(A) or 8(b)(7) of the Act.

Section 8(b)(4)(A), however, merely proscribes forcing an employer "to enter into any agreement which is prohibited by Section 8(e)." Subcontracting clauses coming within the terms of the construction industry proviso to Section 8(e) are, by the very terms of the proviso, not prohibited by Section 8(e). Both as a matter of logic and of settled law, picketing to secure clauses privileged by the proviso does not violate Section 8(b)(4)(A) (see cases cited at note 10, *supra*). And this is true regardless of whether the union has acquired majority status, for, as shown above (pages 15-17, *supra*), subcontracting clauses sought in the collective-bargaining context come within the proviso whether they are contained in a conventional agreement or in a prehire agreement authorized by Section 8(f).

Picketing to obtain a prehire agreement is, however, treated by the Board as unlawful recognitional picketing if it runs afoul of Section 8(b)(7)(C). See *Local 542, Int'l Union of Operating Engineers (R.S. Noonan, Inc.)*, 142 N.L.R.B. 1132, 1135 (1963), enforced, 331 F.2d 99 (3d Cir.), cert. denied, 379 U.S. 889 (1964); *Local 86, Brotherhood of Painters (Carpet Control, Inc.)*, 216 N.L.R.B. 1127, 1132-1133 (1975). See also *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 186 (1978) (picketing to secure prehire agreement "was at least arguably subject to the prohibition on recognitional picketing contained in § 8(b)(7)(C)"); *NLRB* v. *Local Union No. 103, Iron Workers*, 434 U.S. 335 (1978) (picketing to enforce 8(f) contract is

subject to Section 8(b)(7)(C) restrictions). Thus, the Board's interpretation of the Act with respect to such picketing does not, as petitioners assert (Pet. 40), grant construction unions "unfettered coercive means" to obtain prehire agreements. It is, rather, a defensible interpretation of the statute that is "entitled to considerable deference." *NLRB* v. *Local Union No. 103, Iron Workers, supra*, 434 U.S. at 350. Under that interpretation, picketing to secure a prehire agreement is lawful only where, as here, there is a representation question capable of resolution under the Board's procedures and the union has not picketed beyond the 30 days specified in Section 8(b)(7)(C) without having filed a representation petition.[21]

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[21] As the court below noted (Pet. App. 19a n.11), both Schriver and Topaz "employed carpentry workers who were eligible to vote in a representational election"; accordingly, any picketing was clearly subject to the restrictions of Section 8(b)(7)(C).

The court below left open the question whether coercion to secure an 8(f) agreement would violate Section 8(b)(7)(C) from the outset where, "due to the fact that no workers are employed at the time of the picketing, a representational election is not possible" (Pet. App. 19a n.11). Cf. *Drivers, Chauffeurs, Warehousemen & Helpers Union, Local No. 71* v. *NLRB*, 553 F.2d 1368, 1374-1377 (D.C. Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD SCHRIVER, INC., SULLIVAN-KELLEY & ASSOCIATES, TOPAZ CONTRACTING & DEVELOPMENT COMPANY, INC., AND SULLIVAN AND ASSOCIATES,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE
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NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

PETITIONERS REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI FOR THE DISTRICT OF COLUMBIA CIRCUIT

I.

UNLESS THE PETITION IS GRANTED SUPREME COURT REVIEW WILL BE FORECLOSED AND CONSTRUCTION UNIONS WILL BE ABLE TO COERCE STRANGER CONTRACTORS TO ACCEPT BROAD SUBCONTRACTING RESTRICTIONS

The Solicitor General agrees with Petitioners that the issues presented--the

scope of the section 8(e) construction industry in the aftermath of Connell Constr. Co. v. Plumbers, Local 100, 421 U. S. 616 (1975) and the relationship between sections 8(e) and 8(f) of the National Labor Relations Act, are "of importance in the application of the National Labor Relations Act to the construction industry ..." (Opp. p. 12). Notwithstanding the government's recognition of the significant impact the decisions below have had upon an industry fundamental to the Nation's economy; the Solicitor General implausibly asserts the review should be denied solely because there are no inconsistent circuit court decisions. The Unions do not claim the issues decided below are insignificant, rather they contend the petition should be dismissed because it "is at best premature" (Opp. pp. 1-2).

In fact, unless the Court accepts this petition, the opportunity for review by the highest authority of these paramount issues will be forever precluded. Since issuance of the Board

decision in this case on November 13, 1978; the Board's General Counsel has been barred by the instant Board precedent from issuing the same section to 8(b)(4)(A) and 8(e) complaints which preceded the instant case. "(The Board's General Counsel), of course, must respect the rules of decision of the Board ...." 93 Cong. Rec. 6859 (1947) (remarks of Sen. Taft). See also Hanna Mining Co. v. Dist. 2 Marine Engrs., 382 U.S. 181, 186 (1965) (§ 8(b)(4) charge dismissed since picketing in conformity with NLRB standards). Section 3(d) of the Act confers upon the General Counsel the sole authority to prosecute allegations of unfair labor practices. The Board then has no jurisdiction sua sponte to reverse the decision below in the future and will not even obtain the opportunity since the General Counsel is precluded from issuing complaints by operation of the decision appealed from here. Since there is apparently no federal court jurisdiction to review the General Counsel's refusals to issue complaints predicated upon Board

precedent[1], the issues here will necessarily escape federal circuit court review. Accordingly, the instant petition is not "premature".

Congress enacted sections 8(e) and (f) in 1959. Since 1959, only one "section 8(e) proviso case" has reached the Court, and in Connell the Court did not definitively define (1) the parameters of a "collective bargaining relationship" between construction companies and craft unions or (2) the legal scope of secondary subcontracting restrictions as applied to current and future jobsites, to employers signatory to contracts with the one union or all craft unions, to jobsites where no members of the signatory union are working, or whether evidence of jobsite friction is necessary to validate concerns over jobsite friction between union and nonunion employers. The instant petition raising questions of coercive attempts to

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[1] Rockford Redi-Mix Co. v. Lubbers, et al, 632 F.2d 30 (7th Cir. 1980), cert. denied, 450 U.S. ___ (No. 80-5903 Feb. 23, 1981); Pacific Southwest Airlines v. NLRB 611 F.2d 1309 (9th Cir. 1980).

obtain restrictive agreements from contractors whose employees the unions have never represented nor attempted to represent presents the last possibility for this Court to address both these issues[2].

Since NLRB v. Jones & Laughlin Steel Corp., 301 U.S.1 (1937), the Court has exercised its certiorari jurisdiction to insure that the Board and the courts respect the balance struck by Congress in the Taft-Hartley Act between labor and

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[2] Certiorari petitions filed on April 29, 1981, in Pacific Northwest Chapter, et al. v. NLRB, (9th Cir. April 17, 1981) (en banc), a case consolidated with the instant case before the NLRB, present separate but equally important questions: whether subcontracting clauses can be sought by coercion and the actual scope of subcontracting restrictions where the union represents the contractor's employees, a question left open in Connell. Acceptance of these petitions as well as the instant petition provides comprehensive resolution upon fully developed factual records of closely interrelated questions.

management. See e.g. American Ship Bldg. v. NLRB, 380 U.S. 300, 316-17 (1965). In 1959, Congress intended to close secondary boycott loopholes and curb construction union "top down" recognition abuses. Connell, supra, 421 U. S. at 633. The instant petition is the first (and last) case in the nearly 22 years since the 1959 enactment of the construction industry proviso presenting for review whether the result reached by the Board below is consistent with the paramount purpose of federal labor policy to grant all employees, including construction industry employees, the public right to "bargain collectively through representatives of their own choosing." Connell, supra, 421 U.S. at 628. The instant petition questions the unfettered right granted craft unions by the Board and the Court of Appeals to coercively limit present and future jobsite work to union members through broad restrictive sub-contracting clauses creating union only jobsites forcing all craft workers to join craft unions or lose employment opportunities regardless of their particular desire for union representation. The decisions below, contrary to the rationale of

Connell, subordinate the section 7 rights of construction industry employees to the self interest of the construction union to obtain all union jobsites without first obtaining designation as the bargaining agent of the affected employees[3] by a limitless "interpretation" of the § 8(e) construction industry proviso[4].

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[3] Here, the Carpenters Local 1497 obtained a voluntary agreement with Schriver in June 1972 but made no attempt at any time to organize Schriver's carpentry employees and Schriver continued to operate as if there never had been such a voluntary signing until the coercion in the instant case.

[4] The Court below construed the proviso to protect coercive demands for such unlimited contracting restrictions in all circumstances where the pressured contractor employs any craft workers or where the contractor, like Topaz, unlike Schriver the co-petitioner, functions as a general contractor without any craft employees but retains the right to accept bids from subcontractors who employ craft workers. There is then no situation in the construction industry where such coercive demands can be resisted under section 8(b)(4)(A) since, under the rationale below all such coercive picketing and threats of picketing are equivalent to the establishment of a "collective bargaining relationship."

Unless the instant petition is accepted, the unprecedented and unsupportable nullification of section 7 rights will be

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(Footnote 4 Concluded)...

This rationalization not only nullifies 8(b)(4)(A) and allows the § 8(e) proviso to swallow the prohibition against admittedly secondary subcontracting restriction in § 8(e), it also nullifies the 1959 Congressional harmonization of sections 8(e) and (f) in the aftermath of Carpenters, Local 1976 v. NLRB (Sand Door), 357 U.S. 93 (1958), that only voluntary 8(e) and 8(f) agreements are permitted. In this respect, the decision below disregards NLRB v. Ironworkers, 434 U.S. 335, 348 n.10 (1978) wherein the Court recognized Congress intended to legalize only uncoerced § 8(f) agreements.

Coercive attempts to obtain 8(f) agreements which include subcontracting restrictions are proscribed by section 8(b)(4)(A) unless sought by a union which is the bargaining representative of the picketed employer's craft workers or is entitled to presumption of majority status either because the contractor actually employs union members or a majority of nonunion members have signed uncoerced bargaining authorization cards.

permanent[5].

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[5] The Solicitor's insistence (Opp. 23-24) that section 8(b)(7) provides the sole remedy because the picketing is arguably recognitional or organizational ignores stipulated facts. The unions here picketed and threatened to picket solely to obtain agreement to subcontracting restrictions. It also ignores that the issue here concerns the legality vel non of subcontracting restrictions under section 8(e). The scope of the § 8(e) proviso cannot be expanded solely by reference to 8(b)(7) because each is "aimed at wholly different problems." Dallas Bldg. Trades Council v. NLRB, 396 F.2d 677, 682 (D.C. Cir. 1968). Deference to the Board is entirely unwarranted where it seeks to justify its "interpretation" of the Act by reference to an irrelevant statutory provision not involved in this case.

II.

CONFLICTING INTERPRETATIONS OF CONNELL BY TWO FEDERAL CIRCUITS REQUIRE RESOLUTION

The Ninth Circuit's en banc opinion in Pacific Northwest Chapter, et al. v. NLRB, ___F.2d ___ (April 17, 1981), petitions for certiorari filed April 28, 1981 is premised upon a radically different interpretation of Connell from that of the District of Columbia Circuit below. This Court's overriding concern to preserve federal labor law restrictions upon "top down" organizing tactics by construction unions is regarded as "entirely inapplicable" by the court below (Pet. App. 30-a) solely because the unions did not affirmatively disclaim a recognition object[6], and

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[6] Contrary to the union's insistence (Opp. p.7), this difference is legally insignificant. The Connell Court's concern was for the top down organizing effects upon construction contractors other than Connell. The precisely identical effect is present in this case.

also surrounded the restrictive clause with other terms and conditions of employment.[7] The Ninth Circuit

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[7] The decisions below fail to distinguish section 8(f) pre-hire contracts from collective bargaining agreements or relationships, contrary to this Court's decision in NLRB v. Ironworkers, supra, recognizing such contracts as "merely preliminary" to a bargaining relationship. 434 U.S. at 345. Earlier the Board's General Counsel had also recognized that pre-hire agreements prior to and after the 1959 section 8(f) and (e) amendments to the Act "are not conventional collective bargaining agreements, nor is a conventional collective bargaining relationship sought, but rather an attempt is made to obtain skeleton agreements (containing little more than subcontracting provisions)" (citing Dallas Bldg. v. NLRB, supra, 396 F.2d at 682). Report on Case Handling at NLRB 1974 Labor Relations Yearbook (BNA) 298, 307.

Now, however, we are told by the Board in the instant cases that Congress in 1959 equated a skeleton agreement to a collective bargaining relationship notwithstanding a prevalent construction industry practice to the contrary. The instant record demonstrates by stipulation that nationwide prior to 1959 these skeleton agreements were present in less than 10% of the industry. The studies cited by the Solicitor are contrary to the record here. (Opp. p.20).

contrary to the Court of Appeals below, necessarily recognized the Connell Court's holding that impermissible "top down" organizing effects are present in any secondary subcontracting restriction. The Ninth Circuit interpreted Connell to permit these prohibited effects only when the union has a pre-existing primary interest in the signatory employer's workers demonstrated by either section 9 representation [8] status or by a presumption of such status:

> "When a union represents employees of a prime contractor and seeks a subcontracting agreement, it has the interests of the employees in its primary bargaining unit at stake to at least some degree." Sl. Op. pp. 22-3.

It is stipulated in the instant case that the unions had no "pre-existing primary" representation interests in Topaz's carpentry employees and in the case of Schriver the earlier pre-hire agreement

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[8] The Ninth Circuit's en banc decision is attached to the Solicitor's April 24, 1981 letter to the Clerk. References herein are to the slip opinion pages of the Court's opinion.

was never given any effect, thus the "top down" organizing impact upon other subcontractors stands alone. These conflicting interpretations of the Court's Connell opinion can only be reconciled by this Court.

The Ninth and District of Columbia Circuits have also adopted three different views of the legal scope of secondary subcontracting restrictions. The District of Columbia Circuit perceives no limitation upon such restrictions. They are enforceable at all present and future jobsites regardless of whether members of the signatory unions will be working at the jobsite and subcontracting restrictions apply to all contractors who have contracts with any craft unions affiliated with the District Council, not just to a particular union. The Ninth Circuit en banc majority limits secondary subcontracting restrictions to contractors having agreements with the same signatory union but applies them to jobsites where members of the signatory union are not working (Sl. Op. 27). The four dissenting

Ninth Circuit judges conclude the Court's phrase "particular job site" (421 U.S. at 635) places outside the section 8(e) construction industry proviso subcontracting restrictions extending to any jobsite where the signatory contractor does not employ union members (dissenting opinion of J. Sneed at p. 1 and of J. Farris at p. 3). These directly conflicting interpretations of Connell also can only be clarified by this Court [9].

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[9] The Ninth Circuit majority "concede that the language of the Connell opinion dealing with congressional antagonism to "top down organizing" may well lean in a direction contrary to our views." Sl. Op. p. 27.

III.

THE UNRESTRICTED FREEDOM GRANTED CONSTRUCTION UNIONS TO COERCIVELY CREATE UNION ONLY JOBSITES THREATENS THE COMPETITIVE BIDDING SYSTEM IN AN IMPORTANT SEGMENT OF THE NATION'S ECONOMY

Although Congress specifically condemned "top down" organizing tactics in the construction industry as inimical to the section 7 right of craft employees, the decisions below stands Congress' purpose on its head by so broadly construing the section 8(e) construction industry proviso as to swallow section 8(b)(4)(A) and by authorizing craft unions to use unrestricted coercion to force contractors to work and bid upon only all union jobsites. Under this erroneous rationale contrary to the decision of the Court, unions can picket general contractors like Connell and Topaz to force them to agree to subcontract jobsite work only to contractors signatory to union contracts. Since general contractors do not perform the work subject to the subcontracting restrictions, the Board in earlier decisions agrees that section 8(b)(7) does not have any application. Sletten Constr. Co., 222 NLRB 176 (1976). Non-union contractors can only become "acceptable" bidders by signing the union contract. These restrictive subcontract agreements and the union's newly created powers to enforce them also force non-signatory construction companies and their employees

off jobsites where craft work is let by competitive bids. Such agreements further preclude unionized contractors from bidding on any work where one contractor might be non-union. The circle is complete and the "top down" organizing effect achieved is identical to the proscribed object of Local 100 in Connell. The open-ended inflationary impact upon an industry where recovery is critical to our economic stability effected solely by a reversal of federal labor policy has such adverse consequences to the general consuming public as to warrant immediate review by this Court. The decisions below legalize coercive conduct to obtain broad subcontracting restrictions in all circumstances unless the pressuring union affirmatively disclaims recognitional interest. Unions would now be able to control the companies with whom a general and a subcontractor may do business under circumstances completely divorced from a collective bargaining relationship. This competitive dislocation within the construction industry is simply not

sanctioned by federal labor policy. There is no forum except this Court where the nation's largest industry can turn for review of the anti-competitive and "top down" organizing consequences resulting from the decisions below.

CONCLUSION

The instant petition is the last opportunity to finally define or clarify a "collective bargaining relationship" in the context of the section 8(e) construction industry proviso and prevent its "top down" imposition upon stranger contractors and their employees. The resolution of the issue has uncontested importance to national labor policy concerning a vital segment of the nation's economy. The petition for certiorari should be granted.

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Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE CENTER ON NATIONAL LABOR POLICY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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IN THE

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NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION OF *AMICUS CURIAE* CENTER ON NATIONAL LABOR POLICY FOR LEAVE TO FILE BRIEF IN SUPPORT *OF THE PETITION OF SCHRIVER-TOPAZ*

Center on National Labor Policy hereby respectfully moves pursuant to this Court's Rule 36 for leave to file its brief *amicus curiae* in support of the petition of Donald Schriver, Inc., et. al. Consent was sought from all parties and received from Petitioners and Respondent. Consent from Intervenor unions in the case below, has not been confirmed. All these documents have been filed with the Clerk.

The accompanying brief urges this Court to reverse the holding of the United States Court of Appeals in *Donald Schriver, et. al.* v. *NLRB, et. al,* No. 79-1001 (D.C. Cir. Oct. 20, 1980).

Center on National Labor Policy is a national non-profit, non-partisan organization, chartered as a public interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers. Private pressure groups, such as organized labor groups, have a history of significant impact on the rights of the public, consumers, taxpayers, and workers. As this Court recognized in *Connell Const. Co.* v. *Plumbers and Steamfitters Local No. 100,* 421 U.S. 616, 625 (1975), union pressure "could result in significant adverse effects on the market and on consumers . . ." When organized labor pressure is supported by administrative policy, as in the case at bar, significant questions are raised concerning the civil rights of other affected parties: the public, consumers, taxpayers, and workers.

The Center, as a public interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to collective rights of pressure groups such as labor unions. Where administrative policy gives an advantage to a private association engaged in coercive activity through economic sanctions, the agency is answerable for the impact on the rights of individuals.

Because Center on National Labor Policy can bring to this case a diverse perspective not presently represented, the Center's participation can assist the Court in obtaining full consideration of public interest issues.

Accordingly, Center on National Labor Policy respectfully requests leave to file the annexed brief *amicus curiae.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1257

DONALD SCHRIVER, INC., SULLIVAN-KELLEY & ASSOCIATES, TOPAZ CONTRACTING & DEVELOPMENT COMPANY, INC., and SULLIVAN AND ASSOCIATES,
Petitioners,

VS.

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF CENTER ON NATIONAL LABOR POLICY AS AMICUS CURIAE IN SUPPORT OF THE PETITION OF SCHRIVER-TOPAZ

INTEREST OF AMICUS

Center on National Labor Policy is a national non-profit, non-partisan organization, chartered as a public interest legal foundation to engage in national litigation in matters affecting the public interest. Among its objectives, the Center is concerned about the impact of pressure groups on the civil rights of the public, consumers, taxpayers, and workers.

When organized labor pressure is supported by a state policy of benefits to pressure group members, significant Con-

stitutional questions are raised concerning the individual rights of other affected parties. The Center, as a public interest organization, believes that individual rights of consumers, taxpayers, workers, and public citizens should be paramount to the collective privileges of pressure groups such as labor unions. Where administrative action undergirds the coercive power of such groups, the impact on the public interest may be substantial. Consequently, the Center's concerns about this impact are significant.

Further background and interests of amicus have been detailed in the preceding motion for leave to file this brief.

INTRODUCTION

Schriver and Topaz engage in construction work as general contractors and builders. Each hires their own employees and none of their workers have ever been represented by any union, nor has any union sought recognition of Schriver's or Topaz's employees. (Pet.-5). As stipulated in the record, neither Carpenters Local 1752 nor Carpenters Local 1497 have ever tried to organize the workers of either employer. Both Schriver and Topaz subcontract work out to union and non-union subcontractors, awarding the jobs based on competitive bidding. Because of Local 1497's threats of secondary pressure and Local 1752's illegal picketing, Schriver and Topaz were forced to sign pre-hire agreements excluding non-union subcontractors from obtaining any of their work. The agreements effectively precluded continued employment of Schriver-Topaz workers, so long as they remained non-union.

The agreement, on its face, applies whether or not the signatory union's members are at work at the particular site. Instead of supporting industrial stability as the mainstay of federal labor law policy, the Court of Appeals has undermined this policy by affording unions engaged in the construction industry an unlimited weapon with which to create labor strife at construction jobsites. The result of the District of Columbia Circuit's decision is to validate "top-down organizing," an unintended extension of federal labor law.

ARGUMENT

I. COERCED PRE-HIRE AGREEMENTS ARE UNPROTECTED BY §8(e) OF THE NATIONAL LABOR RELATIONS ACT

A. THE COURT OF APPEALS HAS REJECTED THIS COURT'S PROHIBITION IN *CONNELL* AND THEREBY VALIDATED ILLEGAL TOP-DOWN ORGANIZING

In *Connell Const. Co., Inc.* v. *Plumbers Local No. 100,* 421 U.S. 616 (1975), this court held that prehire agreements which limit subcontracting of construction work to only union subcontractors are not protected under the National Labor Relations Act, 29 U.S.C. §158 ("NLRA"), but rather are federal antitrust violations. In reaching this decision, this Court canvassed the legislative history of §8(e) of the NLRA, 29 U.S.C. §158(e).

The court noted:

> The purpose of the §8(e) proviso was to alleviate the frictions that may arise when union men work continuously alongside non-union men on the same construction site.

Drivers Local 695 v. *NLRB,* 361 F.2d 547, 553 (D.C. Cir. 1966). It was not the purpose of §8(e) to allow the employer to choose his employees' bargaining representative.

Indeed, one of the major aims of Congress in passing the Landrum-Griffin amendments to Taft-Hartley was to limit "top-down" organizing campaigns that forced employers to recognize a union regardless of the wishes of their employees. *See* II *Legislative History of the LMRDA,* 1175-1176, 1191-92, 1523 (1959). The Court in *Connell* recognized the potential for abuse if §8(e) agreements were allowed to be made and enforced through coercive tactics, regardless of the wishes of employees. This court stated:

> These careful limits on the economic pressure unions may use in aid of their organizational compaigns would be undermined seriously if the proviso to §8(e) were con-

> strued to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing. Absent a clear indication that Congress intended to leave such a glaring loophole in its restriction on "top-down" organizing . . . we think its [§8(e)] authorization extends only to agreements in the context of collective bargaining relationships and in light of Congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well.

421 U.S. at 633.

Misinterpreting this Court's language in *Connell*, the District of Columbia Circuit has now validated top-down organizing by upholding the coerced agreement signed by Schriver and Topaz.

The D.C. Circuit seems to ignore this Court's clear language in *Connell*. Instead of requiring Locals 1752 and 1497 to be engaged in a collective bargaining relationship or at least be attempting to establish one, the court below held the mere unilateral *attempt* to force a general contractor to sign a pre-hire agreement is sufficient to establish a collective bargaining relationship. (See Pet. 28-a). The Court of Appeals, however, managed to overlook the critical fact that Local 1752 and 1497, just like the union in *Connell, never* represented or attempted to represent either Schriver's or Topaz's employees. Instead, through the use of a pre-hire agreement, the union has succeeded in avoiding the wishes of Schriver's and Topaz's employees. The "touchstone" of a §8(e) agreement or its maintenance is that it is addressed to the labor relations of the employer "vis-a-vis his own employees." *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 644-45 (1967).

The Court of Appeals recognized the danger, but rather than discussing the interrelationship between connecting sections of the NLRA, summarily dismissed the application of prehire agreements as unfair labor practices through §8(b)(4)(b). (Pet. 22-a). Clearly, this is top-down organizing at its worst. When the unions threatened and picketed to force Schriver and Topaz to sign these agreements, they committed an unfair labor practice.

> It is an unlawful labor practice under §8(b) (4) of the NLRA, 29 USCA §158(b) (4), for a labor union to indulge in secondary boycotting practice by inducing a person to refuse to perform any services where an object thereof is to force one employer to cease doing business with another employer, or to force an employer *to recognize a labor union* as the representative of his employees unless such labor union is the legal representative of such employees.

Texas Distrib., Inc. v. *Local 100,* 598 F.2d 393, 398 (5th Cir. 1979) (emphasis added).

B. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS IN THE SECOND, THIRD, FIFTH, SIXTH, SEVENTH, EIGHTH, AND NINTH CIRCUITS

The cases in the circuits listed above have interpreted this Court's decision in *Connell* and lined up on both sides of the decision of the District of Columbia Circuit. The decisions have taken hold of various sub-elements of the two-element test (particular jobsite-collective bargaining relationship) for prehire agreements under *Connell,* and have either supported this Court and its policy decisions, or stretched the *Connell* decision beyond recognition.

1. A Collective Bargaining Relationship Presupposes Employee Support.

The critical conflict among the cases centers on what prerequisites are needed to establish a collective bargaining relationship. The District of Columbia Circuit expressly disagreeing with the Ninth Circuit in *Pacific Northwest Chapter* v. *NLRB,* 609 F.2d 1341 (9th Cir. 1979), has stated that the mere attempt to establish a prehire agreement is sufficient to create a collective bargaining relationship. (Pet. 37-a). Cases holding contra to this theory are: *NLRB* v. *Iron Workers, Local 103,* 434 U.S. 335 (1978); *NLRB* v. *Int'l Bhd. Elect. Wrkrs., Local 265,* 604 F.2d 1091 (8th Cir. 1979); *Texas Distrib., Inc.* v. *Local 100,* 598 F.2d 393 (5th Cir. 1979); *Lail* v. *C & R Constr. Co.,* Civ. No. 1-80-52 (E.D. Tenn. Jan. 26, 1981); *UMWA* v. *Otis*

Elevator Co., 491 F. Supp. 496, (W.D. Pa. 1980); *Washington Area Carpenters Welfare Fund* v. *Overhead Door Co.*, 488 F.Supp. 816 (D.D.C. 1980); *Squillacote* v. *Racine Bldg. & Const. Trades*, 483 F.Supp. 1218 (E.D. Wis. 1980)[1]; *Long* v. *Floorcraft Carpet Co.*, 82 Lab. Cas. 16151 (D. Ore. 1977). *Cf. Contractors, Laborers, Teamsters & Engineers, Health & Welfare Plan* v. *Associated Wreckers*, No. 80-1191 (8th Cir. Jan. 21, 1981); *In re Bullard Contracting Corp.*, 464 F. Supp. 312 (W.D. N.Y. 1979). The establishment of a collective bargaining relationship, as the first prong of the *Connell* test, is crucial to the validity of a §8(e) exemption because such a relationship assures that workers' rights have not been overlooked.

On the issue of whether subsequent majority status is needed to enforce a prehire agreement, the following courts have held that a pre-hire agreement is only a preliminary step to the creation of a collective bargaining relationship and majority status is legally required to enforce such an agreement: *NLRB* v. *Iron Workers, Local 103*, 434 U.S. 335 (1978); *NLRB* v. *Int'l Bhd. Elect. Wrkrs., Local 265*, 604 F.2d 1091 (8th Cir. 1979); *Lail* v. *C & R Constr. Co.*, Civ. No. 1-80-52 (E.D. Tenn. Jan. 26, 1981) *UMWA* v. *Otis Elevator Co.*, 491 F. Supp. 496 (W.D. Pa. 1980); *Washington Area Carpenters Welfare Fund* v. *Overhead Door Co.*, 488 F. Supp. 816 (D.D.C. 1980); *Squillacote* v. *Racine Bldg. & Const. Trades*, 483 F. Supp. 1218 (E.D. Wis. 1980). The intent to gain majority status is important because once majority status is achieved, and only then, a collective bargaining relationship is established.

Courts holding majority status is not needed to enforce the agreement are: the District of Columbia Circuit in the instant case and *Landscape Specialities, Inc.* v. *Laborers Int'l, Local 806*, 477 F. Supp. 17 (C.D. Ca. 1979). *See also Contractors, Laborers, Teamsters & Engineers, Health & Welfare Plan* v. *Associated Wreckers*, No. 80-1191 (8th Cir. Jan. 21, 1981)

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[1] On July 9, 1980, subsequent to the decision in *Squillacote* v. *Racine Building & Const. Trades*, 483 F. Sup. 1218 (E.D. Wis. 1980), the Board gave its approval to a consent decree which essentially embodied the terms of that court's temporary restraining order. This Board decision, at least impliedly, shows a reversal of its decision in *Schriver-Topaz*.

(Eighth Circuit reverses itself in one year). *See NLRB* v. *Int'l Bhd. Elect. Wrkrs., Local 265,* 604 F.2d 1091 (8th Cir. 1979).

The following courts have stated that building and trade unions cannot use coercive letters, threats or picketing to obtain pre-hire agreements from general contractors: *NLRB* v. *Iron Workers, Local 103,* 434 U.S. 335 (1978); *Larry Muko, Inc.* v. *Southwestern Pennsylvania, Building and Trades Council,* 609 F.2d 1368 (3rd Cir. 1979) *Pacific Northwest Chapter* v. *NLRB,* 609 F.2d 1341 (9th Cir. 1979); *NLRB* v. *Int'l Bhd. Elect. Wrkrs., Local 265,* 604 F. 2d 1091 (8th Cir. 1979); *Texas Distrib., Inc.* v. *Local 100,* 598 F.2d 393 (5th Cir. 1979); *UMWA* v. *Otis Elevator Co.,* 491 F. Supp. 496 (W.D. Pa. 1980). The legislative history to §8(f) stresses that pre-hire agreements must be voluntary. *See* 104 Cong. Rec. 11308 (July 16, 1958). In addition, one court has held that a pre-hire agreement is not valid absent voluntary consent. *UMWA* v. *Otis Elevator Co.,* 491 F. Supp. 496, 499 (W.D. Penn. 1980).

Only the District of Columbia Circuit in the instant case and *Landscape, supra,* have held that letters or picketing are legal union activity. However, *Landscape* is at least impliedly reversed by *Pacific Northwest Chapter* v. *NLRB,* 609 F.2d 1341 (9th Cir. 1979).

On the issue of whether common situs friction was the overriding concern of Congress in legislating the 8(e) provisio, the following circuits have stated that it is controlling; *Larry Muko, Inc.* v. *Southwestern Pennsylvania, Building and Trades Council,* 609 F.2d 1368 (3rd Cir. 1979); *Pacific Northwest Chapter* v. *NLRB,* 609 F.2d 1341 (9th Cir. 1979); *Texas Distrib., Inc.* v. *Local 100,* 598 F.2d 393 (5th Cir. 1979); *Squillacote* v. *Racine Bldg. & Const. Trades,* 483 F.Supp. 1218 (E.D. Wis. 1980). Only the District of Columbia Circuit and one district court have found the common situs friction argument unpersuasive. *See In re Bullard Contracting Corp.,* 464 F. Supp. 312 (W.D. N.Y. 1979).

Whether prehire agreements should be restricted to a particular jobsite and to the signatory union, cases in the Ninth and Seventh Circuits have held in the affirmative. *Pacific*

Northwest Chapter v. *NLRB,* 609 F.2d 1341 (9th Cir. 1979); *Squillacote* v. *Racine Bldg. & Const. Trades,* 483 F.Supp. 1218 (E.D. Wis. 1980). Only the District of Columbia Circuit, using the instant case as a vehicle, has held that prehire agreements need not contain job situs limitations. (Pet 46-a). The second prong to the *Connell* test requires that pre-hire agreements be limited to a particular jobsite.

2. Jobsite Restriction Insures Recognition of Employee Rights.

In *Squillacote* v. *Racine Bldg. & Const. Trades,* 483 F.Supp. 1218 (E.D. Wis. 1980), a local trades council attempted to force a general contractor, by picketing the jobsite, to agree to subcontract to employers who had an agreement with the trades council. The NLRB's regional counsel filed a complaint in District Court alleging unfair labor practice charges under §8(b)(4) of the NLRA. Like the union's action in this case, the object of the picketing was to force the general contractor to bring pressure on subcontractors to sign agreements with the trades council.

The *Squillacote* court stated:

> This court is satisfied that the agreement here was not "in the context of a collective-bargaining relationship" ... Respondents (the union) were not, nor were they in contemplation of becoming, the collective bargaining representative of any A.R.S. (the general contractor's) employees.

483 F.Supp. at 1222.

As noted in *Connell,* §8(e) agreements must be limited to a particular jobsite. On its face, the agreement which Schriver and Topaz were coerced to sign was not limited to a particular jobsite. The D.C. Court of Appeals dismisses this critical second prong to §8(e) validity by stating:

> Accordingly, we hold that the subcontracting agreements in the present case did not violate §8(e) by reason of the fact that the clauses did not need to be renegotiated on each

> individual jobsite, or because the clauses were not limited to particular jobsite at which signatory union workers were already employed.

(Pet. 47-a)

The *Squillacote* court found the union's agreement extended to all jobsites within the trade council's jurisdiction and since the agreement did not limit itself to " 'special problems' inherent in a common-situs relationship on a particular jobsite" the court struck down the agreement as violative of §8(e). 488 F. Supp. at 1222.

Moreover, the Third Circuit has also held that §8(e) agreements are not valid unless they are restricted to a particular jobsite and made within the context of a collective bargaining relationship.

The court in *Larry Muko, Inc.* v. *Southwestern Pennsylvania Building and Trades Council,* 609 F.2d 1368 (3rd Cir. 1979), expressly stated:

> *Connell* is controlling on the question whether that agreement was protected by the construction industry proviso, for here there is neither a collective bargaining relationship with Silver's nor any evidence of a common-situs problem.

609 F.2d at 1375.

In *Muko,* Long John Silver, a restaurant builder, contracted with Muko, a non-union subcontractor, to build a restaurant. Under pressure from the local trades council (which resulted from handbilling once the restaurant opened), Silver subsequently cancelled their contract to build ten more restaurants, even though Muko's bid was $225,000 less than any other subcontractor. The trade council in *Muko,* like the Locals here, not only attempted to, but succeeded in forcing Silver to "cease doing business with" Muko. The Third Circuit held the agreement to be subject to antitrust laws, but clearly indicated that §8(e) agreements are only valid if made in the context of a collective bargaining relationship and restricted to

a particular jobsite. Using *Connell* as controlling precedent, this court stated:

> [t]he Court held that the construction industry proviso was not intended to authorize subcontracting agreements that are neither within the context of collective bargaining relationship nor limited to a particular jobsite.

609 F.2d at 1374-75.

Finally, the Ninth Circuit, in direct conflict with the District of Columbia Circuit's subsequent holding, agreed with *Muko* and this Court in *Connell.* In *Pacific Northwest Chapter* v. *NLRB,* 609 F.2d 1341 (9th Cir. 1979), a case which parallels the facts present here, the Ninth Circuit held:

> [t]hat the construction industry provisio extends shelter only when a collective bargaining relationship exists and even then only when the employer or his subcontractor has employees who are members of the signatory union at work at some time at the jobsite at which the employer wishes to engage a non-union subcontractor.

609 F.2d at 1347.

Clearly, this holding, which more closely traces *Connell, supra,* is the more honest imterpretation of *Connell.* It recognizes what Congress meant to achieve by providing an exception to the general prohibition on "hot cargo" agreements. "Hence, the purpose of the exception dictates its scope." 609 F.2d at 1350.

The District of Columbia Circuit goes to great pains to fashion what it perceives to be the history of collective bargaining in the construction industry. However, "In 1959, when Section 8(e) was enacted, the lawfulness and permissible scope of subcontractor agreements had not been conclusively determined." *Pacific Northwest Chapter* at 1348. "The potential coercive effect of such a provision is manifest. The clause is precisely the kind of instrument for 'top-down' organizing which the Supreme Court condemned in *Connell.*" 609 F.2d at 1350.

Top down organizing is an evil recognized and prohibited by Congress. The Supreme Court cannot allow this degradation of workers' right to be free to choose. For these reasons, and in order to set to rest the conflicts within the District of Columbia, Third, Fifth, Sixth, Seventh and Ninth Circuits, this Court should grant the Writ of Certiorari.

C. THE D.C. CIRCUIT HAS BRASHLY IGNORED AND CAST ASIDE EMPLOYEE RIGHTS TO CHOOSE THEIR BARGAINING REPRESENTATIVE.

The greatest misfortune of the D.C. Circuit's holding is the absolute disregard of workers' legitimate statutory right to choose their own representative. As the court in *Pacific Northwest Chapter* v. *NLRB*, 609 F.2d 1341, 1350 (9th Cir. 1979), correctly recognized, "[A] union signatory subcontractor clause operates to force non-union firms and their employees to submit to union representation in order to be eligible for subcontracting opportunities, thus undermining the rights established in Section 7."

According to the agreement between Schriver, Topaz, Local 1752 and 1497, only union subcontractors would be allowed to bid for work in the jurisdiction of the Trades Council. This restriction violates worker's rights to be free to choose their own collective-bargaining representative. §7 of the NLRA, 29 U.S.C. §157, states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any and all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) (3) of this title.

Clearly, Congress never intended the pre-hire agreement allowed by §8(f) of the NLRA to abrogate this statutory right, unless the workers surrender their right voluntarily. *NLRB* v.

Iron Workers, Local 103, 434 U.S. 335, 349 n. 10 (1978) ("no element of coercion was to be admitted into the narrow exception being established to the majority principle."); *UMWA* v. *Otis Elevator Co.,* 491 F. Supp. 496, 499 (W.D. Pa. 1980) (lack of voluntary consent abrogates agreement).

Although Congress went to great lengths to accomodate special interests of employers and unions in the construction industry, it never intended to "portray" the convenience as an expression of employee choice. *NLRB* v. *Iron Workers, Local 103,* 434 U.S. 335, 350 (1978); *Larry Muko, Inc.* v. *Southwestern Pennsylvania, Building and Trades Council,* 609 F.2d 1368, 1376 (3rd Cir. 1979) (an employer may not coerce his employees into a collective bargaining relationship, even for the purpose of avoiding economic injury, 29 U.S.C. §158(a)(1)).

The right to bargain collectively was given to employees, not to unions who independently decide to intervene at the jobsite. Section 8(f), 29 U.S.C. §158(f), does not override workers' rights of self-determination. *Pacific Northwest Chapter* v. *NLRB,* 609 F.2d 1341, 1350 (9th Cir. 1979).

In remarks made on the floor of the Senate, Senator John F. Kennedy stated:

> It was not the intention of the committee to require by [§8(f)] the making of prehire agreements, but rather, *to permit* them, nor was it the intention of the committee to authorize a labor organization to strike, picket, or otherwise coerce an employer to sign a prehire agreement where the majority status of the union had not been established. The purpose of this section is to permit voluntary prehire agreements.

104 *Cong. Rec.* 11308 (July 16, 1958).

In the face of clear legislative history to the contrary and the Supreme Court's recent decision in *NLRB* v. *Iron Workers, Local 103,* 434 U.S. 335 (1978), the Court of Appeals has wrongfully raised the pre-hire agreement to the status of a collective bargaining agreement. Under the D.C. Circuit's view, an §8(f) agreement is sufficient to establish a collective

bargaining relationship. They hold to this position even though these agreements can be terminated by either party at will, *Eastern District Council* v. *Blake Construction Co.*, 457 F.Supp. 825 (E.D. Va. 1978), are not enforceable until the union gains majority status, *Contractors, Laborers, Teamsters & Engineers, Health & Welfare Plan* v. *Associated Wreckers,* 484 F.Supp. 582 (D. Neb. 1980) (*rev'd, Contractors, Laborers, Teamsters & Engineers, Health & Welfare Plan* v. *Associated Wreckers,* No. 80-1191 (8th Cir. Jan. 21, 1981); *Washington Area Carpenters Welfare Fund* v. *Overhead Door Co.*, 488 F.Supp. 816 (D.D.C. 1980) and are "merely a preliminary step that contemplates further action for development of a full bargaining relationship." *Ruttman Construction Co.*, 191 NLRB 701, 702 (1971). *See also: NLRB* v. *Iron Workers, Local 103,* 434 U.S. 335 (1978); *NLRB* v. *Int'l Bhd. Elect. Wrkrs., Local 265,* 604 F.2d 1091 (8th Cir. 1979); *Lail* v. *C & R Constr. Co.*, Civ. No. 1-80-52 (E.D. Tenn. Jan. 26, 1981); *UMWA* v. *Otis Elevator Co.*, 491 F. Supp. 496, (W.D. Pa. 1980); *Squillacote* v. *Racine Bldg. & Constr. Trades,* 483 F. Supp. 1218 (E.D. Wis. 1980).

A pre-hire agreement cannot substitute for lawful recognition or certification of a union. To allow the coerced pre-hire agreement to become such a substitute for the purpose of meeting the *Connell* test that allows §8(e) agreements only in the context of collective bargaining is to effectively deny the existence of the employees' statutory and First Amendment right to choose. *NLRB* v. *Iron Workers, Local 103,* 434 U.S. 335, 350 (1978); *Garment Workers* v. *NLRB,* 366 U.S. 731, 737 (1961). In this case, the D.C. Circuit's usurpation of employee rights is even more egregious because neither Local 1752 or 1497 was the least bit interested in organizing the employees of Schriver or Topaz. (Stipulated facts Pet. 5)

CONCLUSION

That concept of national labor policy which promotes freedom of choice by the worker is sometimes reflexively misconstrued to promote unionism over voluntary non-unionism. To the extent that a government would step into the workplace and makes the choice for the worker, the Constitution stands as a bar. This Court must safeguard employee associational rights against encroachment by inconsistent and overbroad extensions undermining its own precedent. For these reasons, the Center on National Labor Policy respectfully requests this Court grant the Petition for Writ of Certiorari and reverse the decision of the Court of Appeals.

Respectfully submitted,

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